DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 1 (MONDAY, JUNE 30, 2014)

I. INTRODUCTION TO ANTITRUST AND ANTI-MONOPOLY LAW

A. COMPETITION

1. Parameters of economic competition

2. Key economic terms

a. Price

b. Output

c. Demand

d. Efficiency

e. Welfare

i. Consumer

ii. Producer

iii. Total

f. Concentration

B. SOCIETAL VALUES AND COMPETITION

1. Fairness

2. Opportunity

3. Diversity

4. Freedom

5. Cooperation

6. Open Markets

II. Introduction to America's Antitrust Laws

A. American History and Antitrust

1. Progressivism and Antitrust
2. The Sherman Act of 1890 (15 U.S.C. § 1, et seq.)
3. The Clayton and FTC Acts of 1914
    a. Clayton Act Revisions – 1950
    b. Hart-Scott-Rodino Act – 1976

B. The Chicago School Revolution of the 1980s

1. Consumer welfare and allocative efficiency
2. The concentration/efficiencies paradigm
    a. Robert Bork and "The Antitrust Paradox"
3. The Post-Chicago Era
    a. Behavioral and evolutionary economics

C. U.S. Antitrust Enforcement

1. Federal
    a. Executive branch
        i. DOJ: civil and criminal enforcement
        ii. FTC: civil enforcement – FTC §5
    b. Legislature
    c. Courts
2. States

a. Parens patriae

b. State laws

3. Private enforcement

a. Treble damages

b. Injunctive relief

III. INTRODUCTION TO CHINA'S 2008 ANTI-MONOPOLY LAWS

A. HISTORY & CONTEXT

B. CHINA'S SOCIALIST VALUES

1. Confucianism and Antitrust

C. INTRODUCTION TO CHINA'S AML

IV. READINGS

A. OUTLINE

B. RELEVANT STATUTES

1. Sherman Act §§ 1 and 2

2. Clayton Act § 7

3. FTC Act § 5

4. Anti-Monopoly Law of the People's Republic of China (Arts. 1-9)

C. ARTICLES

1. Horton, "Confucianism and Antitrust" (2013) (pgs. 193-214)

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 2 (TUESDAY, JULY 1, 2014)

I. INTRODUCTION TO HORIZONTAL PRICE-FIXING

A. THE ECONOMICS OF PRICE-FIXING

1. Why is price-fixing harmful?

a. *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000)

2. Enforcing price-fixing agreements

a. Solving cartel "cheating" issues

3. Horizontal non-price agreements

II. PRICE-FIXING IN THE U.S.

A. THE SHERMAN ACT § 1

B. PER SE ILLEGALITY

1. *U.S. v. Trenton Potteries* (1927)

2. *U.S. v. Socony-Vacuum Oil Co.* (1940)

C. INTRODUCTION TO THE "RULE OF REASON"

1. *U.S. v. Brown Univ. 5 F. 3d 658* (3d Cir. 1993)

III. PRICE-FIXING IN CHINA

A. AML ARTS. 13-15

B. ENFORCEMENT IN CHINA

1. NDRC

2. SAIC

C. RELEVANT CASES

1. Rice Noodles (2010)

2. Green Mung Beans (2010)

3. Pre-Mixed Concrete (2011)

4. Paper Manufacturing (2011)

5. Sea and Sand Dredging (2012)

6. LCD Panels (2013)

IV. STUDENT ACTIVITIES

A. CARTEL FORMATION

B. CARTEL ENFORCEMENT

V. READINGS

A. CASES

1. *U.S. v. Andreas* (7th Cir. 2000)

2. *U.S. v. Brown Univ.* (3rd Cir. 1993)

B. Book Chapters

1. China's AML: The First Five Years (pgs. 84-89)

2. Competition Law in China (pgs. 89-91)

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 3 (WEDNESDAY, JULY 2, 2014)

I. COLLUSIVE ANTICOMPETITIVE EFFECTS AND THE RULE OF REASON

A. CASES

1. *National Soc. Of Professional Engineers v. U.S.* (1978)

2. *U.S. v. Brown Univ.* (3d. Cir. 1993)

3. *FTC v. Superior Ct. Trial Lawyers Ass'n* (1990)

4. *Polygram Holding v. FTC* (D.C. Cir. 2005)

a. The Three Tenors

B. VALUES AND COOPERATION

II. PROVING ANTICOMPETITIVE AGREEMENTS

A. DEFINING AGREEMENTS

1. Intra-enterprise Agreements

2. Tacit Collusion

B. PRICE-FIXING MECHANISMS

1. Information Exchanges

a. Price signaling

2. Trade Associations

3. Threats and Intimidation

C. "ECONOMIC PLAUSIBILITY" AND AGREEMENTS

1. *Matsushita Electric Ind. Co. v. Zenith Radio Co.* (1986)

2. Heightened pleading standards

a. *Bell Atlantic Co. v. Twombly* (2007)

III. PREPARING FOR ANTITRUST TRIALS

A. ANTITRUST DISCOVERY

B. STUDENT ACTIVITIES

C. READINGS

1. Horton/Huang – Analyzing Information Exchanges between Competitors under the AML (2013) (pgs. 95-108; 117)

2. AML and Practice in China (2011) (pgs. 59-64)

3. Cases

a. *Natl. Soc. Engins*. (excerpts)

b. *FTC v. Sup. Ct. Trial Lawyers* (excerpts)

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 4 (THURSDAY, JULY 3, 2014)

I. HORIZONTAL MARKET DIVISIONS

A. TERRITORIAL AGREEMENTS

1. *Palmer v. BRG of Georgia* (1990)

B. OUTPUT RESTRICTIONS

1. *NCAA v. Univ. of Oklahoma* (1984)

2. *Polygram Holding v. FTC* (D.C. Cir. 2005)

C. QUALITY AGREEMENTS

1. Standards setting

2. Trade Associations

II. JOINT VENTURES

A. NEW PRODUCTS

1. *BMI v. CBS* (1979)

B. RESEARCH & DEVELOPMENT

C. PRODUCTION & MANUFACTURING

D. DISTRIBUTION

E. ADVERTISING

F. LOBBYING

III. TRIAL PREPARATION

A. *U.S. v. BROWN UNIV.*

B. *U.S. v. PROF. SOC. ENGINS.*

C. *FTC v. SUP. CT. TRIAL LAWYERS*

IV. READINGS

A. CASES

1. *Palmer v. BRG of Georgia* (1990)

2. *NCAA v. Univ. of Okla.* (1984)

B. ARTICLES/BOOK CHAPTERS

1. Horton/Huang (pgs. 114-16)

2. Competition Law in China (pgs. 91-94)

3. AML and Practice in China (pgs. 70-73)

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 5 (FRIDAY, JULY 4, 2014)

I. WEEK 1 STUDENT TRIALS

A. *U.S. v. BROWN UNIV.*

B. *U.S. v. PROF. SOC'Y. ENGINS.*

C. *FTC v. SUP. CT. TRIAL LAWYERS*

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 6 (MONDAY, JULY 7, 2014)

I. INTRODUCTION TO MERGER ANALYSIS

A. POSSIBLE REASONS FOR MERGERS

1. Procompetitive

2. Anticompetitive

3. Competitively neutral

B. U.S. STATUTORY FRAMEWORK

1. Clayton Act § 7 (1914)

a. 1950 Amendments

2. Hart-Scott-Radino Act (HSR) of 1976

a. Notification

b. Approval process

c. Litigation v. settlement

C. CONCENTRATIONS OF UNDERTAKINGS IN THE PRC

1. AML Arts. 20-31

2. Merger review process

3. Review standards

II. STRUCTURAL AND PERFORMANCE ISSUES IN MERGER ANALYSES

A. INDUSTRY STRUCTURE AND CONCENTRATION

1. Relevant Market Analyses

    a. Product Market

    b. Geographic Market

    c. Entry

2. Concentration measures

    a. HHIs

3. Industry history and performance

    a. Technology issues

    b. Network Issues

B. ANALYZING MERGER CASES

1. U.S. Horizontal Merger Guidelines (2010)

2. U.S. cases

    a. *Brown Shoe Co. v. U.S.* (1962)

    b. *U.S. v. Philadelphia Nat'l Bank* (1963)

3. U.S. Merger litigation

C. PRC MERGER CASES

1. *Coca-Cola/Huiyan*

2. GM—Delphi

    a. Vertical concerns

3. *Novartis-Alcon*

III. MERGER REMEDIES

A. STRUCTURAL

1. Divestitures

B. BEHAVIORAL

1. Consent decrees

C. EFFECTIVENESS OF REMEDIES

IV. READINGS

A. ARTICLES/BOOK CHAPTER EXCERPTS

1. Horton – A Comparison of Merger Remedies in the U.S. and EU

2. Horton – The New United States Horizontal Merger Guidelines

3. AML and Practice in China (pgs. 158-60; 164-166)

4. Competition Law in China (pgs. 133-34; 137-38; 141)

5. China's AML Law (pgs. 195-199)

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 7 (TUESDAY, JULY 8, 2014)

I. DEFINING RELEVANT ANTITRUST MARKETS

A. PROVING RELEVANT MARKETS

1. *FTC v. Staples* (D.C. Cir. 1997)

B. MARKET DEFINITION IN CHINA

C. ARE ANTITRUST MARKETS THE CORRECT FOCUS?

1. 2010 U.S. Horizontal Merger Guidelines

2. Competitive effects analysis

3. Predicting competitive effects

II. STUDENT MERGER SIMULATIONS

A. GROUP SIMULATIONS

1. Putting mergers together

2. Defending and challenging proposed mergers

III. READINGS

A. BOOK CHAPTERS

1. China's AML: The First Five Years (pgs. 179-187; 193-94)

3. AML and Practice in China (pgs. 154-55; 163)

B. EXCERPTS FROM FTC V. STAPLES CASE

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 8 (WEDNESDAY, JULY 9, 2014)

I. MONOPOLIZATION IN THE U.S.

A. STATUTES

1. Sherman Act § 2

2. Attempted Monopolization

3. Conspiracies to monopolize

B. PROVING MONOPOLIZATION

1. Market shares

2. Intent

3. Anticompetitive effects

a. Abusive practices

C. CASES

1. *Aspen Skiing Co. v. Aspen Highlands* (1985)

2. *U.S. v. Microsoft* (D.C. Cir. 2001)

II. ABUSE OF A DOMINANT POSITION IN CHINA

A. STATUTES AND REGULATIONS

1. AML 13-19

B. PROHIBITED CONDUCT

1. Pricing

2. Predatory pricing

3. Refusals to deal

4. Exclusive Dealing

5. Tying

6. Discriminatory treatment/price discrimination

7. Abuse of IP

C. PRC CASES

1. *Netcom, Shanda and Baidu*

2. *Tencent QQ v. Qihoo 360*

3. *J & J* (Resale price maintenance)

III. READINGS

A. BACKGROUND

1. AML and Practice in China (pgs. 90-91; 94-96; 106-110; 117-122)

2. Interview with Shang Ming

B. EVIDENCE FROM FTC V. STAPLES CASE

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 9 (THURSDAY, JULY 10, 2014)

I. COURSE REVIEW

II. PREPARATION FOR MONOPOLIZATION/ABUSE OF DOMINANCE TRIALS

A. *U.S. v. MICROSOFT*

B. *Tencent QQ v. QIHOO 360*

C. *U.S. v. MONSANTO* (HYPOTHETICAL)

III. READINGS

A. Cases

1. *U.S. v. Microsoft*

2. *Tencent QQ v. Qihoo 360*

DAILY OUTLINES

COMPARATIVE ANTITRUST & COMPETITION LAW

DAY 10 (FRIDAY, JULY 11, 2014)

I. FINAL MONOPOLIZATION/ABUSE OF DOMINANCE MOCK TRIALS

A. *U.S. v. MICROSOFT*

B. *Tencent QQ v. QIHOO 360*

C. *U.S. v. MONSANTO*

DAY 1, MONDAY, JUNE 30, 2014

1. OUTLINE
2. RELEVANT STATUTES
    1. Sherman Act §§ 1 and 2
    2. Clayton Act § 7
    3. FTC Act § 5
    4. Anti-Monopoly Law of the People's Republic of China (Arts. 1-9)
3. ARTICLES
    1. Horton, "Confucianism and Antitrust" (2013) (pgs. 193-214)

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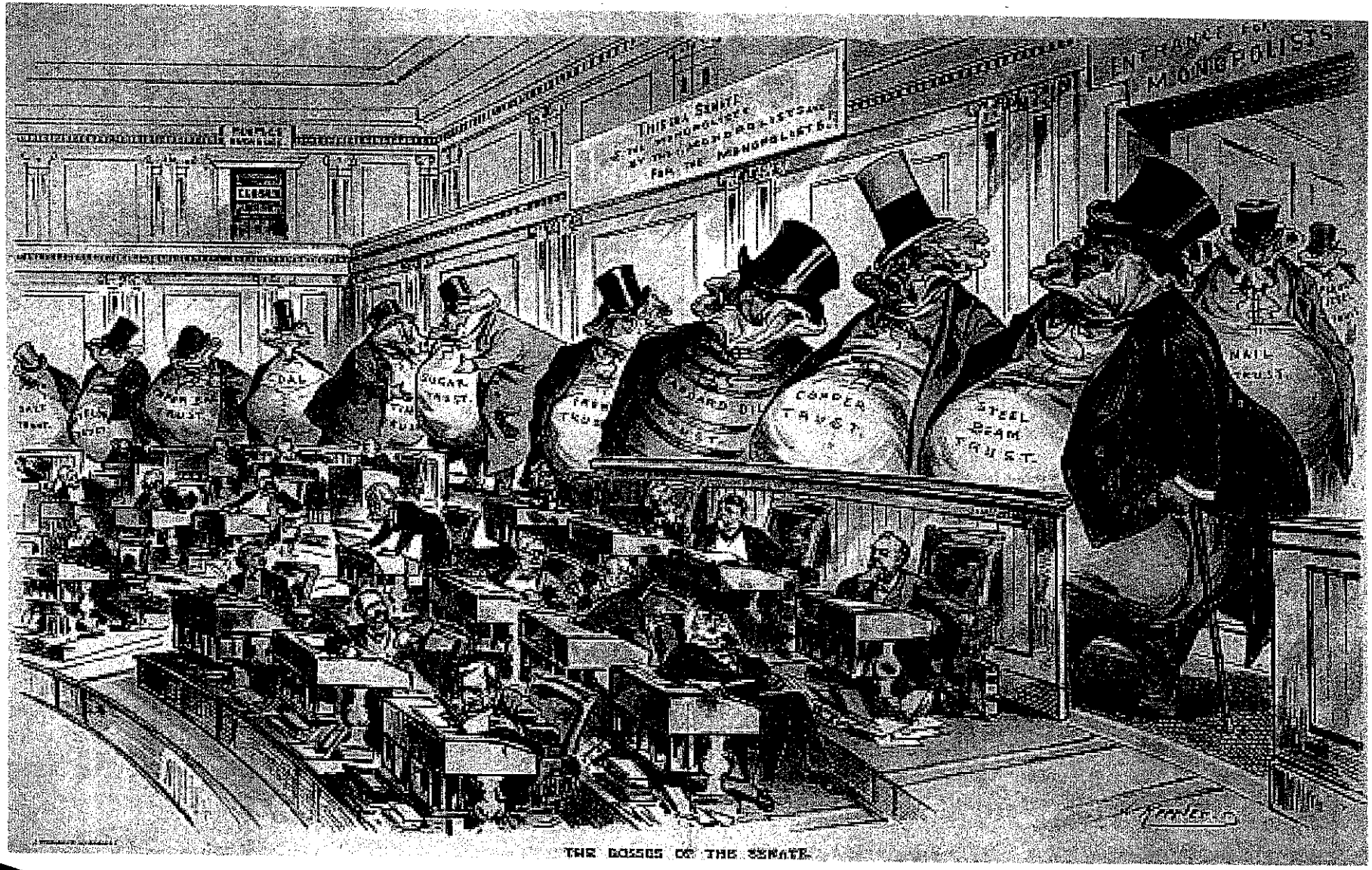
THE MODERN COLOSSUS OF (RAIL) ROADS.

http://fineartamerica.com/images-medium/anti-trust-cartoon-1879-granger.jpg



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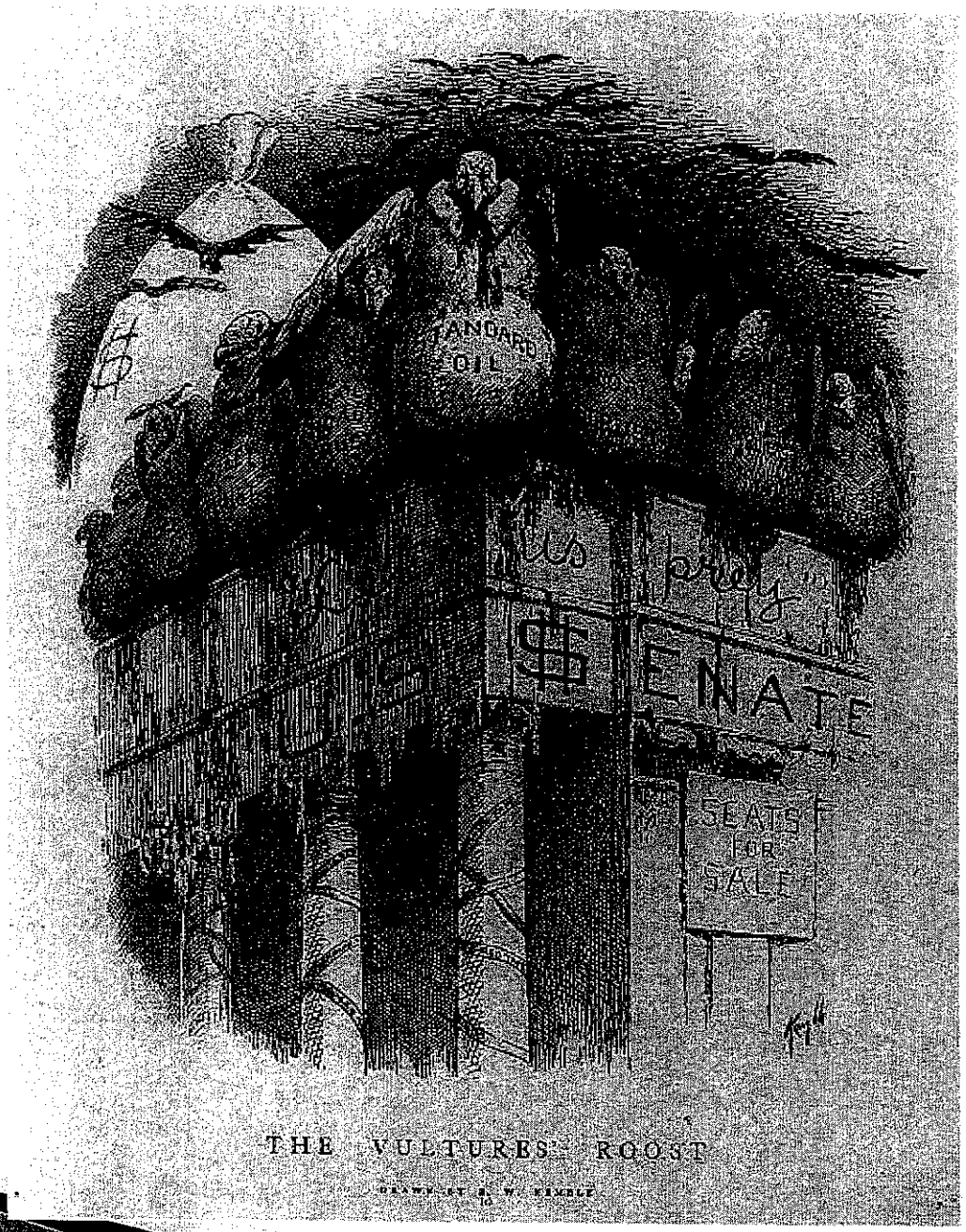

THE VULTURES' ROOST

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PUTTING THE SCREWS ON HIM.

Sherman Act

Section 1 [15 U.S.C. § 1]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub. L. 101-588, § 4(a), 104 Stat. 2880, as amended June 22, 2004, Pub. L. 108-237, title II, subtitle A, § 215(a), 118 Stat. 668.)

Section 2 [15 U.S.C. § 2]. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub. L. 101-588, § 4(b), 104 Stat. 2880, as amended June 22, 2004, Pub. L. 108-237, title II, subtitle A, § 215(b), 118 Stat. 668.)

Section 3 [15 U.S.C. § 3]. (a) Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(b) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce in any Territory of the United States or of the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia, and any State or States or foreign nations, shall be deemed guilty of a felony,

and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 3, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub. L. 101-588, § 4(c), 104 Stat. 2880, as amended Nov. 2, 2002, Pub. L. 107-273, Div C, Title IV, § 14102(b), 116 Stat. 1921, as amended June 22, 2004, Pub. L. 108-237, title II, subtitle A, § 215(c), 118 Stat. 668.)

Section 4 [15 U.S.C. § 4]. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

(July 2, 1890, ch. 647, § 4, 26 Stat. 209; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

Section 5 [15 U.S.C. § 5]. Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

(July 2, 1890, ch. 647, § 5, 26 Stat. 210.)

Section 6 [15 U.S.C. § 6]. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

(July 2, 1890, ch. 647, § 6, 26 Stat. 210.)

Section 6A [15 U.S.C. § 6a; added by Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, § 402]. This Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act, other than this section.

If this Act applies to such conduct only because of the operation of paragraph (1)(B), then this Act shall apply to such conduct only for injury to export business in the United States.

(July 2, 1890, ch. 647, § 7, as added Oct. 8, 1982, Pub. L. 97-290, title IV, § 402, 96 Stat. 1246.)

Section 7 [15 U.S.C. § 7]. The word "person," or "persons," wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(July 2, 1890, ch. 647, § 8, 26 Stat. 210.)

Clayton Act

Section 1 [15 U.S.C. § 12]. (a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-six, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nation, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States; Provided, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

(Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730; Sept. 30, 1976, Pub. L. 94-435, title III, § 305(b), 90 Stat. 1397, as amended Nov. 2, 2002, Pub. L. 107-273, Div C, Title IV, § 14102(c)(2)(A), 116 Stat. 1921.)

Section 2 [Amended by the Robinson-Patman Act, reprinted *infra*.]

Section 3 [15 U.S.C. § 14]. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Oct. 15, 1914, ch. 323, § 3, 38 Stat. 731.)

Section 4 [15 U.S.C. § 15]. (a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, status, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b)(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of title 28 of the United States Code, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, United States Code, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28, United States Code.

(Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731; Sept. 12, 1980, Pub. L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub. L. 97-393, § 1, 96 Stat. 1964.)

Section 4A [15 U.S.C. § 15a]. Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representatives, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and

(4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

(Oct. 15, 1914, ch. 323, § 4A, as added July 7, 1955, ch. 283, § 1, 69 Stat. 282, and amended Sept. 12, 1980, Pub. L. 96-349, § 4(a)(2), 94 Stat. 1156; Nov. 16, 1990, Pub. L. 101-588, § 5, 104 Stat. 2880.)

Section 4B [15 U.S.C. § 15b]. Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

(Oct. 15, 1914, ch. 323, § 4B, as added July 7, 1955, ch. 283, § 1, 69 Stat. 283, and amended Sept. 30, 1976, Pub. L. 94-435, title III, § 302(1), 90 Stat. 1396.)

Section 4C [15 U.S.C. § 15c]. (a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been

awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only—

(A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b)(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 15 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

(Oct. 15, 1914, ch. 323, § 4C, as added Sept. 30, 1976, Pub. L. 94-435, title III, § 301, 90 Stat. 1394, and amended Sept. 12, 1980, Pub. L. 96-349, § 4(a)(3), 94 Stat. 1157.)

Section 4D [15 U.S.C. § 15d]. In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

(Oct. 15, 1914, ch. 323, § 4D, as added Sept. 30, 1976, Pub. L. 94-435, title III, § 301, 90 Stat. 1395.)

Section 4E [15 U.S.C. § 15e]. Monetary relief recovered in an action under section 15c(a)(1) of this title shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

(Oct. 15, 1914, ch. 323, § 4E, as added Sept. 30, 1976, Pub. L. 94-435, title III, § 301, 90 Stat. 1395.)

Section 4F [15 U.S.C. § 15f]. (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

(Oct. 15, 1914, ch. 323, § 4F, as added Sept. 30, 1976, Pub. L. 94-435, title III, § 301, 90 Stat. 1395.)

Section 4G [15 U.S.C. § 15g]. For the purposes of sections 15c, 15d, 15e, and 15f of this title:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

(Oct. 15, 1914, ch. 323, § 5, 38 Stat. 731; July 7, 1955, ch. 283, § 2, 69 Stat. 283; Dec. 21, 1974, Pub. L. 93-528, § 2, 88 Stat. 1706; Sept. 30, 1976, Pub. L. 94-435, title III, § 302(2), 90 Stat. 1396; Sept. 12, 1980, Pub. L. 96-349, § 5(a), 94 Stat. 1157, as amended June 22, 2004, Pub. L. 108-237, title II, subtitle B, § 221(b), 118 Stat. 668.)

Section 6 [15 U.S.C. § 17]. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

(Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731.)

Section 7 [15 U.S.C. § 18]. No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located so as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

(Oct. 15, 1914, ch. 323, § 7, 38 Stat. 731; Dec. 29, 1950, ch. 1184, 64 Stat. 1125; Sept. 12, 1980, Pub. L. 96-349, § 6(a), 94 Stat. 1157; Oct. 4, 1984, Pub. L. 98-443, § 9(l), 98 Stat. 1708; Dec. 29, 1995, Pub. L. 104-88, title III, § 318(1)(A), 109 Stat. 949; Feb. 8, 1996, Pub. L. 104-104, title VI, § 601(b)(3), 110 Stat. 143.)

Section 7A [15 U.S.C. § 18a]. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person—

(A) in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or

(B)(i) in excess of $50,000,000 (as so adjusted and published) but not in excess of $ 200,000,000 (as so adjusted and published); and

(ii)(I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more;

(II) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or

(III) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

(b)(1) The waiting period required under subsection (a) shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of—

(i) the completed notification required under subsection (a), or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors

of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

(c) The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under section 10(e) of the Home Owners' Loan Act [12 U.S.C. § 1467a(e)], section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. § 1828(c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. § 1842), except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 4(k) of the Bank Holding Company Act of 1956 [12 U.S.C. § 1843(k)]; and (B) does not require agency approval under section 3 of the Bank Holding Company Act of 1956 [12 U.S.C. § 1842];

(8) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. § 1843), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. § 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction, except that a portion of a transaction is not exempt under this paragraph if such portion of the transaction (A) is subject to section 4(k) of the Bank Holding Company Act of 1956 [12 U.S.C. § 1843(k)]; and (B) does not require agency approval under section 4 of the Bank Holding Company Act of 1956 [12 U.S.C. § 1843];

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B).

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section—

(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

(e)(1)(A) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(B)(i) The Assistant Attorney General and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person to determine—

(I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or

(II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person. (ii) Internal review procedures for petitions filed pursuant to clause (i) shall include reasonable deadlines for expedited review of such petitions, after reasonable negotiations with investigative staff, in order to avoid undue delay of the merger review process.

(iii) Not later than 90 days after the date of the enactment of this Act, the Assistant Attorney General and the Federal Trade Commission shall conduct an

internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.

(iv) Not later than 120 days after the date of enactment of this Act, the Assistant Attorney General and the Federal Trade Commission shall issue or amend their respective industry guidance, regulations, operating manuals and relevant policy documents, to the extent appropriate, to implement each reform in this subparagraph.

(v) Not later than 180 days after the date the of enactment of this Act, the Assistant Attorney General and the Federal Trade Commission shall each report to Congress—

(I) which reforms each agency has adopted under this subparagraph;

(II) which steps each has taken to implement such internal reforms; and

(III) the effects of such reforms.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 30 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person,

(A) all the information and documentary material required to be submitted pursuant to such a request, or

(B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act [15 U.S.C. § 18] or section 5 of the Federal Trade Commission Act [15 U.S.C. § 45], or an action is filed by the United States, alleging that a proposed acquisition violates such section 7 [15 U.S.C. § 18] or section 1 or 2 of the Sherman Act [15 U.S.C. §§ 1 or 2], and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies [to] the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.

(g)(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) and as may be extended under subsection (e)(2), the United States district court—

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) and as may have been extended under subsection (e)(2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.

(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

(i)(1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act [15 U.S.C. § 41 *et seq.*], or any other provision of law.

(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

(k) If the end of any period of time provided in this section falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103(a) of title 5 of the United States Code), then such period shall be extended to the end of the next day that is not a Saturday, Sunday, or legal public holiday.

Federal Trade Commission Act

Section 1 [15 U.S.C. § 41]. A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: *Provided, however*, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the Commission's membership. No Commissioner shall engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

The Commission shall have an official seal, which shall be judicially noticed.

(Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717; Mar. 21, 1938, ch. 49, § 1, 52 Stat. 111; 1950 Reorg. Plan No. 8, § 3, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265.)

Section 2 [15 U.S.C. § 42]. Each commissioner shall receive a salary, payable in the same manner as the salaries of the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive a salary, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.[1]

With the exception of the secretary, a clerk to each Commissioner, the attorneys, and such special experts and examiners as the Commission may from time to time find necessary for the conduct of its work, all employees of the Commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the Commission and by the Director of the Office of Personnel Management.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of

[1] Note: The United States Code version of this section has "omitted as obsolete" the amount to be paid each of the commissioners (i.e. "of $10,000 a year") and the secretary (i.e. "of $5,000 a year"). These salary levels are now codified at Title 5 (Government Organization and Employees), sections 5414 and 5315, and chapter 51, subchapter III of chapter 53, and section 5504, respectively.

Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Commission.

Until otherwise provided by law, the Commission may rent suitable offices for its use.

The General Accounting Office shall receive and examine all accounts of expenditures of the Commission.

(Sept. 26, 1914, ch. 311, § 2, 38 Stat. 718; June 10, 1921, ch. 18, title III, § 304, 42 Stat. 24; 1978 Reorg. Plan No. 2, § 102, 43 F.R. 36037, 92 Stat. 3783.)

Section 3 [15 U.S.C. § 43]. The principal office of the Commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

(Sept. 26, 1914, ch. 311, § 3, 38 Stat. 719.)

Section 4 [15 U.S.C. § 44]. The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" includes all documents, papers, correspondence, books of accounts, and financial and corporate records.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February 14, 1887, and all Acts amendatory thereof and supplementary thereto [49 U.S.C. § 10101 *et seq.*] and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890: also sections 73 to 76, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76, of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

"Banks" means the types of banks and other financial institutions referred to in section 18(f)(2) of this title.

(Sept. 26, 1914, ch. 311, § 4, 38 Stat. 719; Mar. 21, 1938, ch. 49, § 2, 52 Stat. 111; Dec. 19, 1991, Pub. L. 102-242, title II, § 212(g)(1), 105 Stat. 2302; Nov. 2, 2002, Pub. L. 107-273, Div C, Title IV, § 14102(c)(2)(B), 116 Stat. 1921.)

Section 5 [15 U.S.C. § 45]. (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3) of this title, Federal credit unions described in section 18(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. § 181 et. seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States. [Added by Foreign Antitrust Improvements Act of 1982, Pub. L. No. 97–290, § 403.]

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission.

If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the

Anti-Monopoly Law of the People's Republic of China

中华人民共和国反垄断法

(Adopted at the 29th Meeting of the Standing Committee of the National People's Congress on August 30, 2007)

（2007年8月30日第十届全国人民代表大会常务委员会第二十九次会议通过）

第一章 总则	**Chapter I General Provisions**
第一条 为了预防和制止垄断行为，保护市场公平竞争，提高经济运行效率，维护消费者利益和社会公共利益，促进社会主义市场经济健康发展，制定本法。	**Article 1** This Law is enacted for the purposes of preventing and prohibiting monopolistic conduct, safeguarding fair market competition, improving efficiency of economic operation, protecting the consumer and public interests, and promoting the healthy development of the socialist market economy.
第二条 中华人民共和国境内经济活动中的垄断行为，适用本法；中华人民共和国境外的垄断行为，对境内市场竞争产生排除、限制影响的，适用本法。	**Article 2** This Law is applicable to monopolistic conduct in economic activities within the territory of the People's Republic of China. This Law is also applicable to monopolistic conduct outside the territory of the People's Republic of China that have the effect of eliminating or restricting competition in the domestic market of the People's Republic of China.

第一章 总则	**Chapter I General Provisions**
第三条 本法规定的垄断行为包括： （一）经营者达成垄断协议； （二）经营者滥用市场支配地位； （三）具有或者可能具有排除、限制竞争效果的经营者集中。	**Article 3** "Monopolistic conduct" is defined in this Law as the following conducts: (1) Monopoly agreements among undertakings; (2) Abuse of dominant market positions by undertakings; and (3) Concentrations of undertakings that result in or may result in the effect of eliminating or restricting competition.
第四条 国家制定和实施与社会主义市场经济相适应的竞争规则，完善宏观调控，健全统一、开放、竞争、有序的市场体系。	**Article 4** The State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision and control, and develop a united, open, competitive, and orderly market system.
第五条 经营者可以通过公平竞争、自愿联合，依法实施集中，扩大经营规模，提高市场竞争能力。	**Article 5** Undertakings may, through fair competition and voluntary alliance, implement concentration, expand business scale, and improve their market competitiveness according to law.
第六条 具有市场支配地位的经营者，不得滥用市场支配地位，排除、限制竞争。	**Article 6** Undertakings with dominant market positions shall not abuse their dominant positions to eliminate or restrict competition.
第七条 国有经济占控制地位的关系国民经济命脉和国家安全的行业以及依法实行专营专卖的行业，国家对其经营者的合法经营活动予以保护，并对经营者的经营行为及其商品和服务的价格依法实施监管和调控，维护消费者利益，促进技术进步。	**Article 7** In industries that implicate national economic vitality and national security, which are controlled by state-owned enterprises, and in industries in which monopolies are granted by law, the State shall protect the lawful business activities of those enterprises, supervise and control their conduct and prices for the products and services pursuant to law, protect the interests of consumers, and promote the technological progress.

前款规定行业的经营者应当依法经营，诚实守信，严格自律，接受社会公众的监督，不得利用其控制地位或者专营专卖地位损害消费者利益。	The undertakings in the industries specified in the preceding paragraph shall conduct their business according to law, act in good faith, observe strict self-discipline, subject themselves to the supervision from the public, and shall not impair the interests of consumers by exploitation of their controlling or exclusive and monopoly positions.
第八条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，排除、限制竞争。	**Article 8** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative power to eliminate or restrict competition.
第九条 国务院设立反垄断委员会，负责组织、协调、指导反垄断工作，履行下列职责： （一）研究拟订有关竞争政策； （二）组织调查、评估市场总体竞争状况，发布评估报告； （三）制定、发布反垄断指南； （四）协调反垄断行政执法工作； （五）国务院规定的其他职责。 国务院反垄断委员会的组成和工作规则由国务院规定。	**Article 9** The State Council will set up the Anti-Monopoly Commission ("AMC"), which is responsible for organizing, coordinating and supervising anti-monopoly-related activities, and performs the following functions: (1) Researching and formulating competition policies; (2) Organizing investigation and evaluation of the overall market competition condition and publishing evaluation reports; (3) Formulating and publishing anti-monopoly guidelines; (4) Coordinating administrative enforcement of the Anti-Monopoly Law; and (5) Other functions specified by the State Council The organization and working rules of the Anti-Monopoly Commission shall be formulated by the State Council.

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第一章 总则	**Chapter I General Provisions**
第十条 国务院规定的承担反垄断执法职责的机构（以下统称国务院反垄断执法机构）依照本法规定，负责反垄断执法工作。 国务院反垄断执法机构根据工作需要，可以授权省、自治区、直辖市人民政府相应的机构，依照本法规定负责有关反垄断执法工作。	**Article 10** The Anti-monopoly Enforcement Authority designated by the State Council to undertake the responsibilities of Anti-Monopoly Law enforcement (hereinafter referred to as Anti-monopoly Enforcement Authority under the State Council, "AMEA") is responsible for the enforcement of the Anti-Monopoly Law. The AMEA, if necessary, may authorize corresponding organs of the People's Governments of provinces, autonomous regions, and provincial level municipalities to be responsible for relevant anti-monopoly enforcement activities in accordance with this Law.
第十一条 行业协会应当加强行业自律，引导本行业的经营者依法竞争，维护市场竞争秩序。	**Article 11** Industrial associations shall strengthen self-discipline of the industries, provide guidance for undertakings in relevant industries to compete lawfully, and maintain the order of market competition.
第十二条 本法所称经营者，是指从事商品生产、经营或者提供服务的自然人、法人和其他组织。 本法所称相关市场，是指经营者在一定时期内就特定商品或者服务（以下统称商品）进行竞争的商品范围和地域范围。	**Article 12** "Undertaking" in this Law refers to a natural person, a legal person, or any other organization that engages in the production or operation of commodities or provision of services. "Relevant market" in this Law refers to the product market and geographic market within which the undertakings compete against each other during a certain period of time with respect to specific commodities or services (hereinafter "product").

第二章 垄断协议	**Chapter II Monopoly Agreements**
第十三条 禁止具有竞争关系的经营者达成下列垄断协议： （一）固定或者变更商品价格； （二）限制商品的生产数量或者销售数量； （三）分割销售市场或者原材料采购市场； （四）限制购买新技术、新设备或者限制开发新技术、新产品； （五）联合抵制交易； （六）国务院反垄断执法机构认定的其他垄断协议。 本法所称垄断协议，是指排除、限制竞争的协议、决定或者其他协同行为。	**Article 13** The following monopoly agreements among competing undertakings shall be prohibited: (1) Fixing or changing prices of products; (2) Restricting output or sales volume of products; (3) Allocating sales market or raw material purchasing market; (4) Restricting the purchase of new technology or new equipment, or restricting the development of new technology or new products; (5) Jointly boycotting; and (6) Other monopoly agreements as determined by the AMEA. "Monopoly agreements" in this Law refer to agreements, decisions, or other concerted practices that eliminate or restrict competition.
第十四条 禁止经营者与交易相对人达成下列垄断协议： （一）固定向第三人转售商品的价格； （二）限定向第三人转售商品的最低价格； （三）国务院反垄断执法机构认定的其他垄断协议。	**Article 14** The following monopoly agreements between undertakings and their trading partners shall be prohibited: (1) Fixing the resale price to a third party; (2) Restricting the minimum price for resale to a third party; or (3) Other monopoly agreements determined by the AMEA.
第十五条 经营者能够证明所达成的协议属于下列情形之一的，不适用本法第十三条、第十四条的规定： （一）为改进技术、研究开发新产品的；	**Article 15** Any agreement shall be exempted from the application of Articles 13 and 14 if it is proved by the undertakings to be for one of the following objectives: (1) improving techniques, or researching and developing new products;

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第二章 垄断协议	**Chapter II Monopoly Agreements**
（二）为提高产品质量、降低成本、增进效率，统一产品规格、标准或者实行专业化分工的； （三）为提高中小经营者经营效率，增强中小经营者竞争力的； （四）为实现节约能源、保护环境、救灾救助等社会公共利益的； （五）因经济不景气，为缓解销售量严重下降或者生产明显过剩的； （六）为保障对外贸易和对外经济合作中的正当利益的； （七）法律和国务院规定的其他情形。 属于前款第一项至第五项情形，不适用本法第十三条、第十四条规定的，经营者还应当证明所达成的协议不会严重限制相关市场的竞争，并且能够使消费者分享由此产生的利益。	(2) upgrading product quality, reducing costs, improving efficiency, unifying product specifications and standards, or realizing division of work based on specialization; (3) improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises; (4) realizing public welfare such as conserving energy, protecting the environment, and providing disaster relief; (5) mitigating the severe decrease of sales volume or excessive overstock during economic recessions; (6) protecting the legitimate interests in foreign trade and economic cooperation; or (7) Other circumstances stipulated by laws and regulations of the State Council. Where the monopoly agreement falls under item (1) to (5) in the preceding paragraph, the undertakings shall, in order to be exempted from application of Articles 13 and 14 of this Law, also prove that the agreement will not substantially restrict competition in the relevant market and will enable the consumers to share the benefits derived from the agreement.
第十六条 行业协会不得组织本行业的经营者从事本章禁止的垄断行为。	**Article 16** Industrial associations shall not organize undertakings in the relevant industry to engage in any monopolistic conduct prohibited under this Chapter.

第三章 滥用市场支配地位	**Chapter III Abuse of Dominant Market Position**
第十七条 禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为： （一）以不公平的高价销售商品或者以不公平的低价购买商品； （二）没有正当理由，以低于成本的价格销售商品； （三）没有正当理由，拒绝与交易相对人进行交易； （四）没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易； （五）没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件； （六）没有正当理由，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇； （七）国务院反垄断执法机构认定的其他滥用市场支配地位的行为。 本法所称市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。	**Article 17** Undertakings with dominant market positions are prohibited from engaging in any of the following conducts that abuses their dominant market positions: (1) Selling products at unfairly high prices or buying products at unfairly low prices; (2) Without valid justification, selling products at prices below cost; (3) Without valid justification, refusing to deal with trading partners; (4) Without valid justification, restricting trading partners to deal exclusively with themselves or with undertakings designated by them; (5) Without valid justification, tying in products or imposing other unreasonable trading conditions; (6) Without valid justification, according differentiated treatment in regard to transaction conditions such as prices to equivalent trading partners; and (7) Other activities determined by the Anti-Monopoly Enforcement Authority as abuse of dominant market positions. "Dominant market position" in this Law refers to the market position that enables the undertakings to control the price or quantity of products or other trading conditions in the relevant market or to impede or affect the entry of other undertakings into the relevant market.

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第三章 滥用市场支配地位	**Chapter III Abuse of Dominant Market Position**
第十八条 认定经营者具有市场支配地位，应当依据下列因素： （一）该经营者在相关市场的市场份额，以及相关市场的竞争状况； （二）该经营者控制销售市场或者原材料采购市场的能力； （三）该经营者的财力和技术条件； （四）其他经营者对该经营者在交易上的依赖程度； （五）其他经营者进入相关市场的难易程度； （六）与认定该经营者市场支配地位有关的其他因素。	**Article 18** A dominant market position shall be determined based on the following factors: (1) The market share of the undertakings and the competitive status in the relevant market; (2) The ability of the undertakings to control the sales market or the raw material purchasing market; (3) The financial and technical status of the undertakings; (4) The degree of reliance on the undertakings by other undertakings in transactions; (5) The difficulty for other undertakings to enter the relevant market; and (6) Other factors relevant to the determination of the undertakings' dominant market position.
第十九条 有下列情形之一的，可以推定经营者具有市场支配地位： （一）一个经营者在相关市场的市场份额达到二分之一的； （二）两个经营者在相关市场的市场份额合计达到三分之二的； （三）三个经营者在相关市场的市场份额合计达到四分之三的 有前款第二项、第三项规定的情形，其中有的经营者市场份额不足十分之一的，不应当推定该经营者具有市场支配地位。 被推定具有市场支配地位的经营者，有证据证明不具有市场支配地位的，不应当认定其具有市场支配地位。	**Article 19** Undertakings can be presumed to have a dominant market position if any of the following conditions is fulfilled: (1) The market share of one undertaking accounts for more than 1/2 in the relevant market; (2) The combined market share of two undertakings accounts for 2/3 in the relevant market; or (3) The combined market share of three undertakings accounts for 3/4 in the relevant market. Among those undertakings that fall under item (2) or (3) of the preceding paragraph, an undertaking whose market share is less than 10% shall not be presumed to have a dominant market position.

	Where the undertaking presumed to have a dominant market position provides evidence of absence of dominant market position, such undertaking shall not be determined to hold a dominant market position.
第四章 经营者集中	**Chapter IV Concentrations of Undertakings**
第二十条 经营者集中是指下列情形： （一）经营者合并； （二）经营者通过取得股权或者资产的方式取得对其他经营者的控制权； （三）经营者通过合同等方式取得对其他经营者的控制权或者能够对其他经营者施加决定性影响。	**Article 20** Concentrations of undertakings refer to the following situations: (1) Mergers; (2) Acquisition of control over other undertakings through acquisition of equity or assets; or (3) Acquisition of control over other undertakings or the capacity to exercise decisive influence on other undertakings by contract or any other means.
第二十一条 经营者集中达到国务院规定的申报标准的，经营者应当事先向国务院反垄断执法机构申报，未申报的不得实施集中。	**Article 21** A prior notification shall be filed with the AMEA by the undertakings if the concentration exceeds the thresholds of notification stipulated by the State Council. The concentration transaction shall not be closed without prior notification.
第二十二条 经营者集中有下列情形之一的，可以不向国务院反垄断执法机构申报： （一）参与集中的一个经营者拥有其他每个经营者百分之五十以上有表决权的股份或者资产的； （二）参与集中的每个经营者百分之五十以上有表决权的股份或者资产被同一个未参与集中的经营者拥有的。	**Article 22** In any of the following situations, undertakings may not file the notification with the AMEA: (1) One undertaking involved in the concentration owns more than 50% of the voting shares or assets of every other undertaking; or (2) An undertaking not involved in the concentration owns more than 50% of the voting shares or assets of each undertaking that is involved in the concentration.

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第四章 经营者集中	**Chapter IV Concentrations of Undertakings**
第二十三条 经营者向国务院反垄断执法机构申报集中，应当提交下列文件、资料： （一）申报书； （二）集中对相关市场竞争状况影响的说明； （三）集中协议； （四）参与集中的经营者经会计师事务所审计的上一会计年度财务会计报告； （五）国务院反垄断执法机构规定的其他文件、资料。 申报书应当载明参与集中的经营者的名称、住所、经营范围、预定实施集中的日期和国务院反垄断执法机构规定的其他事项。	**Article 23** Undertakings that make a notification of concentration shall submit the following documents and information to the AMEA: (1) The notification; (2) The explanation regarding the effects that the concentration may have on competition in the relevant market; (3) The concentration agreement; (4) The financial reports, audited by a certified public accountant, of the undertakings involved in the concentration in the previous accounting year; and (5) Other information required by the AMEA. The notification shall contain the names of the undertakings involved in the concentration, their domiciles, business scopes, the proposed date on which the concentration is to be implemented and other information stipulated by the AMEA.
第二十四条 经营者提交的文件、资料不完备的，应当在国务院反垄断执法机构规定的期限内补交文件、资料。经营者逾期未补交文件、资料的，视为未申报。	**Article 24** Where the submitted documents and materials are not complete, the undertakings concerned shall submit supplemental documents and materials within the time limit stipulated by the AMEA. If the undertakings fail to do so within the provided time limit, no notification shall be deemed made.
第二十五条 国务院反垄断执法机构应当自收到经营者提交的符合本法第二十三条规定的文件、资料之日起三十日内，对申报的经营者集中进行初步	**Article 25** The AMEA shall conduct a preliminary review of the filed notification, and decide whether to initiate further review within 30 days from the date of receipt of the documents and materials

审查，作出是否实施进一步审查的决定，并书面通知经营者。国务院反垄断执法机构作出决定前，经营者不得实施集中。 国务院反垄断执法机构作出不实施进一步审查的决定或者逾期未作出决定的，经营者可以实施集中。	as required by article 23 of this Law, and notify the undertakings of that decision in writing. Before the decision is made by the AMEA, the undertakings concerned shall be prohibited from implementing the concentration. Where the AMEA makes the decision that no further review will be conducted or where the AMEA makes no decision at the expiry of the specified time limit, the undertakings may implement the concentration.
第二十六条 国务院反垄断执法机构决定实施进一步审查的，应当自决定之日起九十日内审查完毕，作出是否禁止经营者集中的决定，并书面通知经营者。作出禁止经营者集中的决定，应当说明理由。审查期间，经营者不得实施集中。 有下列情形之一的，国务院反垄断执法机构经书面通知经营者，可以延长前款规定的审查期限，但最长不得超过六十日： （一）经营者同意延长审查期限的； （二）经营者提交的文件、资料不准确，需要进一步核实的； （三）经营者申报后有关情况发生重大变化的。 国务院反垄断执法机构逾期未作出决定的，经营者可以实施集中。	**Article 26** If the AMEA decides to conduct further review, it shall complete the review within 90 days from the date of its decision for further review, and decide on whether to approve or prohibit the concentration, and notify the undertaking of its decision in writing. If the AMEA decides to prohibit the concentration, it shall explain the reasons thereof. The undertakings shall be prohibited from implementing the concentration during the review period. Under any of the following circumstances, the AMEA may extend the time limit stipulated in the preceding paragraph, provided that the extension does not exceed 60 days at the maximum: (1) The undertakings agree to extend the time limit; (2) The documents submitted by the notifying undertakings are inaccurate and need further verification; or (3) The relevant circumstances have significantly changed after notification by the undertakings.

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第四章 经营者集中	**Chapter IV Concentrations of Undertakings**
	Where the AMEA fails to make a decision at the expiry of the specified period of time, the undertaking may implement the concentration.
第二十七条 审查经营者集中，应当考虑下列因素： （一）参与集中的经营者在相关市场的市场份额及其对市场的控制力； （二）相关市场的市场集中度； （三）经营者集中对市场进入、技术进步的影响； （四）经营者集中对消费者和其他有关经营者的影响； （五）经营者集中对国民经济发展的影响； （六）国务院反垄断执法机构认为应当考虑的影响市场竞争的其他因素。	**Article 27** The following factors shall be considered in the review of concentrations: (1) The market share of the undertakings involved in the relevant market and their ability to control the market; (2) The degree of market concentration in the relevant market; (3) The effect of the concentration on market entry and progress of technology; (4) The effect of the concentration on consumers and other undertakings; (5) The effect of the concentration on national economic development; and (6) Other factors affecting market competition as determined by the AMEA.
第二十八条 经营者集中具有或者可能具有排除、限制竞争效果的，国务院反垄断执法机构应当作出禁止经营者集中的决定。但是，经营者能够证明该集中对竞争产生的有利影响明显大于不利影响，或者符合社会公共利益的，国务院反垄断执法机构可以作出对经营者集中不予禁止的决定。	**Article 28** Where a concentration of undertakings results in or may result in the effect of eliminating or restricting market competition, the AMEA shall make a decision to prohibit the concentration. However, the AMEA may decide not to prohibit the concentration if the undertakings involved can prove either that the positive effects of the concentration exceed the negative effects, or that the concentration is in the public interest.

第二十九条 对不予禁止的经营者集中，国务院反垄断执法机构可以决定附加减少集中对竞争产生不利影响的限制性条件。	**Article 29** Where a concentration is not prohibited, the AMEA may attach restrictive conditions to offset the negative effects of the concentration on competition.
第三十条 国务院反垄断执法机构应当将禁止经营者集中的决定或者对经营者集中附加限制性条件的决定，及时向社会公布。	**Article 30** The AMEA shall publicize, in a timely manner, decisions to prohibit concentrations or decisions to attach restrictive conditions to concentrations.
第三十一条 对外资并购境内企业或者以其他方式参与经营者集中，涉及国家安全的，除依照本法规定进行经营者集中审查外，还应当按照国家有关规定进行国家安全审查。	**Article 31** In addition to reviews of concentrations stipulated by this Law, mergers with or acquisitions of domestic companies by foreign investors or other forms of concentration involving foreign capital, which implicate national security, shall also go through national security reviews according to relevant laws and regulations.
第五章 滥用行政权力排除、限制竞争	**Chapter V Prohibition of Abuse of Administrative Powers to Restrict Competition**
第三十二条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，限定或者变相限定单位或者个人经营、购买、使用其指定的经营者提供的商品。	**Article 32** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative powers by requiring, or requiring in any disguised form, organizations or individuals to manage, purchase, or use products provided by designated undertakings.
第三十三条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，实施下列行为，妨碍商品在地区之间的自由流通：	**Article 33** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative powers to

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第五章 滥用行政权力排除、限制竞争	**Chapter V Prohibition of Abuse of Administrative Powers to Restrict Competition**
（一）对外地商品设定歧视性收费项目、实行歧视性收费标准，或者规定歧视性价格； （二）对外地商品规定与本地同类商品不同的技术要求、检验标准，或者对外地商品采取重复检验、重复认证等歧视性技术措施，限制外地商品进入本地市场； （三）采取专门针对外地商品的行政许可，限制外地商品进入本地市场； （四）设置关卡或者采取其他手段，阻碍外地商品进入或者本地商品运出； （五）妨碍商品在地区之间自由流通的其他行为。	hamper the free movements of products among regions by employing one of the following behaviors: (1) Setting discriminatory charging items, fixing discriminatory prices, or implementing discriminatory charging standards for products originating from other regions; (2) Imposing technical requirements or inspection standards on products originating from other regions that are different from those on local like products, or taking discriminatory technical measures, such as repeated inspection or certification on products originating from other regions, so as to restrict the entry of products originating from other regions into the local market; (3) Creating administrative licensing procedures targeting products from other regions to restrict the access of those products to the local market; or (4) Setting up checkpoints on roads to block either the entry of products originating from other regions or the exit of local products. (5) Other acts preventing the free flow of products among regions.
第三十四条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，以设定歧视性资质要求、评审标准或者不依法发布信息等方式，排斥或者限制外地经营者参加本地的招标投标活动。	**Article 34** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative powers to restrict or reject the participation of undertakings from other regions in

	local bidding activities by imposing discriminatory qualification requirements or assessment standards or by failing to publish information in accordance with the law.
第三十五条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，采取与本地经营者不平等待遇等方式，排斥或者限制外地经营者在本地投资或者设立分支机构。	**Article 35** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative powers through the use of discriminatory treatment to restrict or reject either investment in their region or the establishment of local branches by undertakings from other regions.
第三十六条 行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，强制经营者从事本法规定的垄断行为。	**Article 36** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative powers to compel undertakings to engage in monopolistic activities that are prohibited under this Law.
第三十七条 行政机关不得滥用行政权力，制定含有排除、限制竞争内容的规定。	**Article 37** Administrative agencies shall not abuse their administrative power to promulgate regulations containing contents that eliminate or restrict competition.
第六章 对涉嫌垄断行为的调查	**Chapter VI The Investigation of Suspicious Monopolistic Conducts**
第三十八条 反垄断执法机构依法对涉嫌垄断行为进行调查。	**Article 38** AMEA shall investigate suspicious monopoly conducts in accordance with the law. Any organization or individual may report suspected monopoly conduct that is in violation of this Law to the AMEA. The AMEA should keep the names of the reporters confidential.

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第六章 对涉嫌垄断行为的调查	**Chapter VI The Investigation of Suspicious Monopolistic Conducts**
对涉嫌垄断行为，任何单位和个人有权向反垄断执法机构举报。反垄断执法机构应当为举报人保密。 举报采用书面形式并提供相关事实和证据的，反垄断执法机构应当进行必要的调查。	The AMEA shall conduct the necessary investigation for those reports that are in writing and contain related facts and evidences.
第三十九条 反垄断执法机构调查涉嫌垄断行为，可以采取下列措施： （一）进入被调查的经营者的营业场所或者其他有关场所进行检查； （二）询问被调查的经营者、利害关系人或者其他有关单位或者个人，要求其说明有关情况； （三）查阅、复制被调查的经营者、利害关系人或者其他有关单位或者个人的有关单证、协议、会计账簿、业务函电、电子数据等文件、资料； （四）查封、扣押相关证据； （五）查询经营者的银行账户 采取前款规定的措施，应当向反垄断执法机构主要负责人书面报告，并经批准。	**Article 39** When investigating suspected monopoly conduct, the AMEA can take the following measures: (1) Conduct on premise inspection of the place of business of the undertakings under investigation or other relevant places, (2) Question the undertaking under investigation, interested parties, and other relevant organizations and individuals, requiring them to provide relevant information; (3) Examine or copy relevant documents and information including related documentation, contracts, accounting books, business mail, and electronic data, etc. of the undertaking concerned, interested parties, and other relevant organizations or individuals; (4) Seal up and detain relevant evidence; and (5) Inquire about the bank accounts of the undertakings. Before taking any of the measures stipulated in the preceding paragraph, it shall report in writing to the principal of the AMEA and obtain approval.

第四十条 反垄断执法机构调查涉嫌垄断行为，执法人员不得少于二人，并应当出示执法证件。 执法人员进行询问和调查，应当制作笔录，并由被询问人或者被调查人签字。	**Article 40** When investigating suspected monopoly conduct, there shall be at least two law enforcement personnel, and they shall present valid documents showing their authority to carry out the investigation. The law enforcement personnel shall make a written record of the inquiry and investigation, and such reports shall be signed by the inquired or investigated parties.
第四十一条 反垄断执法机构及其工作人员对执法过程中知悉的商业秘密负有保密义务。	**Article 41** The AMEA and its personnel shall keep confidential the business secrets obtained in the course of enforcement.
第四十二条 被调查的经营者、利害关系人或者其他有关单位或者个人应当配合反垄断执法机构依法履行职责，不得拒绝、阻碍反垄断执法机构的调查。	**Article 42** The undertakings concerned, interested parties, and other relevant organizations and individuals being investigated shall cooperate with the AMEA, and shall not refuse or obstruct the investigation conducted by the AMEA.
第四十三条 被调查的经营者、利害关系人有权陈述意见 反垄断执法机构应当对被调查的经营者、利害关系人提出的事实、理由和证据进行核实。	**Article 43** The undertakings concerned and interested parties have the right to submit statements. The AMEA shall hear the opinions of the undertakings concerned and interested parties and conduct necessary verification of the alleged facts, reasons, and evidences.
第四十四条 反垄断执法机构对涉嫌垄断行为调查核实后，认为构成垄断行为的，应当依法作出处理决定，并可以向社会公布。	**Article 44** Where the AMEA, after investigation and verification of the suspected conducts determines the conduct constitutes monopolistic conducts, it shall make a decision in accordance with the law and may publicize the decision.

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第六章 对涉嫌垄断行为的调查	**Chapter VI The Investigation of Suspicious Monopolistic Conducts**
第四十五条 对反垄断执法机构调查的涉嫌垄断行为，被调查的经营者承诺在反垄断执法机构认可的期限内采取具体措施消除该行为后果的，反垄断执法机构可以决定中止调查。中止调查的决定应当载明被调查的经营者承诺的具体内容。 反垄断执法机构决定中止调查的，应当对经营者履行承诺的情况进行监督。经营者履行承诺的，反垄断执法机构可以决定终止调查。 有下列情形之一的，反垄断执法机构应当恢复调查： （一）经营者未履行承诺的； （二）作出中止调查决定所依据的事实发生重大变化的； （三）中止调查的决定是基于经营者提供的不完整或者不真实的信息作出的。	**Article 45** During the investigation of the suspected conduct, the AMEA may suspend the investigation if the undertakings under investigation undertake to take concrete measures within the time limit as approved by the AMEA to eliminate the effects of such suspected conducts. The decision to suspend investigation should state the concrete commitments by the undertakings. The AMEA shall supervise the implementation of the commitments by the relevant undertakings. If the undertakings implement the commitments, the AMEA may terminate the investigation. However, the AMEA shall resume its investigation if any of the following occurs: (1) The undertakings fail to implement the commitments; (2) The facts on which the decision of suspending investigation depended have undergone significant changes; or (3) The decision to suspend the investigation was based on incomplete or inaccurate information submitted by the undertakings.
第七章 法律责任	**Chapter VII Legal Liability**
第四十六条 经营者违反本法规定，达成并实施垄断协议的，由反垄断执法机构责令停止违法行为，没收违法所得，	**Article 46** Where undertakings reach and implement monopoly agreement in violation of the relevant provisions of this Law, the AMEA shall order the

并处上一年度销售额百分之一以上百分之十以下的罚款；尚未实施所达成的垄断协议的，可以处五十万元以下的罚款。 经营者主动向反垄断执法机构报告达成垄断协议的有关情况并提供重要证据的，反垄断执法机构可以酌情减轻或者免除对该经营者的处罚。 行业协会违反本法规定，组织本行业的经营者达成垄断协议的，反垄断执法机构可以处五十万元以下的罚款；情节严重的，社会团体登记管理机关可以依法撤销登记。	undertakings concerned to cease and desist such acts, confiscate the illegal gains and impose a fine of more than 1% but less than 10% of the total turnover of the undertaking in the previous year; if the monopoly agreement has not been implemented, a fine of less than RMB 500,000 may be imposed. If an undertaking involved in a monopoly agreement reports its monopolistic conduct to the AMEA and provides important evidence, the AMEA may grant reduced penalty or exemption from penalty at the discretion of the AMEA. Where industrial associations organize the undertakings in the relevant industry to conclude monopoly agreements in violation of this Law, the AMEA may impose a fine of less than RMB 500,000; in serious circumstances, the Registration and Administration Authority for Social Organizations may cancel their registration according to law.
第四十七条 经营者违反本法规定，滥用市场支配地位的，由反垄断执法机构责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款。	**Article 47** Where undertakings abuse their dominant market positions in violation of the relevant provisions of this law, the AMEA shall order the undertakings concerned to cease and desist such acts, confiscate the illegal gains, and impose a fine of more than 1% but less than 10% of the total turnover of the undertaking in the previous year.
第四十八条 经营者违反本法规定实施集中的，由国务院反垄断执法机构责令停止	**Article 48** Where undertakings implement concentrations in violation of the relevant provisions of this Law, the AMEA shall order the undertakings

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第七章 法律责任	**Chapter VII Legal Liability**
实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，可以处五十万元以下的罚款。	concerned to stop implementing the concentration, to dispose of its stock or assets within a specified time limit, to assign its business within a specified time limit, to adopt other necessary measures to restore the market situation before the concentration, and to impose a fine of less than RMB 500,000.
第四十九条 对本法第四十六条、第四十七条、第四十八条规定的罚款，反垄断执法机构确定具体罚款数额时，应当考虑违法行为的性质、程度和持续的时间等因素。	**Article 49** Where determination of the amount of fines pursuant to Article 46, Article 47 and Article 48, the AMEA should consider factors such as the nature, seriousness and duration of the illegal act.
第五十条 经营者实施垄断行为，给他人造成损失的，依法承担民事责任。	**Article 50** Undertakings that implement monopoly act and cause damage to others shall bear civil liability according to law.
第五十一条 行政机关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力，实施排除、限制竞争行为的，由上级机关责令改正；对直接负责的主管人员和其他直接责任人员依法给予处分。反垄断执法机构可以向有关上级机关提出依法处理的建议。 法律、行政法规对行政机关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力实施排除、限制竞争行为的处理另有规定的，依照其规定。	**Article 51** Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall be admonished by their superior agencies or departments if they abuse their administrative power to eliminate or restrict competition; the persons in charge and the individuals who are directly responsible shall be disciplined according to law. The AMEA may make a proposal on handling of the matter to the relevant superior authority. Where other laws or administrative regulations provide for the handling of abuses of administrative power by administrative agencies and

	organizations empowered by laws and regulations to perform the functions of public affairs administration, those provisions shall apply.
第五十二条 对反垄断执法机构依法实施的审查和调查，拒绝提供有关材料、信息，或者提供虚假材料、信息，或者隐匿、销毁、转移证据，或者有其他拒绝、阻碍调查行为的，由反垄断执法机构责令改正，对个人可以处二万元以下的罚款，对单位可以处二十万元以下的罚款；情节严重的，对个人处二万元以上十万元以下的罚款，对单位处二十万元以上一百万元以下的罚款；构成犯罪的，依法追究刑事责任。	**Article 52** For those undertakings that refuse to submit related materials and information, submit fraudulent materials or information, conceal, destroy or remove evidence, or refuse or obstruct investigation in any other ways, the AMEA shall ask them to remedy the situation. A fine of less than RMB 20,000 may be imposed on individuals, and a fine of less than RMB 200,000 may be imposed on organizations; and in the case of a serious situation, the AMEA may impose fines from RMB 20,000 to RMB 100,000 against individuals or fines from RMB 200,000 to RMB 1 million against organizations; a criminal liability may be pursued if a violation of criminal law occurs.
第五十三条 对反垄断执法机构依据本法第二十八条、第二十九条作出的决定不服的，可以先依法申请行政复议；对行政复议决定不服的，可以依法提起行政诉讼。 对反垄断执法机构作出的前款规定以外的决定不服的，可以依法申请行政复议或者提起行政诉讼。	**Article 53** Where the undertakings are dissatisfied with the decisions made by the AMEA pursuant to Article 28 and Article 29 of this Law, they may first apply for administrative reconsideration; if they are still not satisfied with the decision of the administrative reconsideration, they may file administrative suits according to law. Where the undertakings are dissatisfied with any decision made by the AMEA other than the decisions specified in the preceding paragraph, the parties may apply for an administrative reconsideration or file an administrative suit.

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第七章 法律责任	**Chapter VII Legal Liability**
第五十四条 反垄断执法机构工作人员滥用职权、玩忽职守、徇私舞弊或者泄露执法过程中知悉的商业秘密，构成犯罪的，依法追究刑事责任；尚不构成犯罪的，依法给予处分。	**Article 54** Where the AMEA staff abuse their power, neglect their duties, receive bribes and cheat, or disclose business secrets obtained during their enforcement activities, which constitute a crime, criminal liability shall be pursued; if their conducts is short of a crime, administrative sanctions shall be given.
第八章 附则	**Chapter VII Supplementary Provisions**
第五十五条 经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用本法；但是，经营者滥用知识产权，排除、限制竞争的行为，适用本法。	**Article 55** This Law is not applicable to conducts of undertakings to exercise their intellectual property rights in accordance with the intellectual property laws and relevant administrative regulations; however, this Law is applicable to conducts of undertakings that abuse their intellectual property rights to eliminate or restrict market competition.
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第五十七条 本法自2008年8月1日起施行。	**Article 57** This Law shall become effective as of August 1st, 2008.

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Confucianism and Antitrust: China's Emerging Evolutionary Approach to Anti-Monopoly Law

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THOMAS J. HORTON*

Abstract

This article discusses the historical, cultural, and philosophical values that have helped mold modern China and its powerful and thriving economy, and examines how they have helped shape and influence China's current Anti-Monopoly Law, which has been in effect since 2008. China's Anti-Monopoly Law reveals China's continuing commitment to honoring and following its traditional Confucian ethics and morals in regulating behavioral and structural competition issues. Rather than following a western neoclassical economic approach, China is pursuing an evolutionary approach in its Anti-Monopoly Law that emphasizes Confucian norms of morality, ethics, fairness, and reciprocity, and the importance of economic diversity, variation and multiplicity. The article explains why continuing cries for China to "get in step" with western neoclassical economic theory are likely to fall on deaf ears.

I. Introduction

In August 2007, the People's Republic of China (PRC), through its National People's Congress, enacted its Anti-Monopoly Law (AML), which first took effect in August 2008.[1] Areas of concern include "Monopoly Agreements,"[2] "Abuses of Dominant Positions,"[3]

* Associate Professor of Law and Johnson, Heidepriem & Abdallah Trial Advocacy Fellow, the University of South Dakota School of Law. The author wishes to thank Tom Geu, Spencer Waller, James W. Bröck, Peter Carstenson, Maurice Stucke, Barry Vickrey, Jenny Xiaojin Huang, and Tie Hu for their helpful comments and inspiration. The author also wishes to thank Teresa Carlisle, Jeffrey Schaefer, and Ashlee Wendt for their able and assiduous efforts.

1. For excellent discussions of the history of China's AML, see CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS (Adrian Emch & David Stallibrass, eds., 2013); H. STEPHEN HARRIS, JR., PETER J. WANG, YIZHE ZHANG, MARK A. COHEN & SEBASTIEN J. EVRAD, ANTI-MONOPOLY LAW AND PRACTICE IN CHINA (2011); *see also* Thomas R. Howell, Alan Wolff, Rachel Howe & Diane Oh, *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL'Y J. 53, 55–63 (2009); Zue Kepeng & Charlotte Z. Westfall, *Chinese Monopoly Law: A Practical Guide*, 18 No. 1 COMPETITION J. ANTITRUST & UNFAIR COMPETITION 1 (2009).

2. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 13–16 (China).

3. *See id.* ch. III, art. 17–19.

"Concentrations of Undertakings,"[4] and "Prohibitions of Abuse of Administrative Powers to Restrict Competition."[5] Although China's AML is in its infancy, and numerous questions remain to be answered, China has gained valuable experience in interpreting and enforcing its AML since 2008.[6]

Competition laws and their enforcement provide a probing lens into the fundamental values and norms that undergird a modern society's economic and political systems.[7] As a result, China's new AML and its first five years of enforcement offer unique potential insights into China's traditional values and culture, and their possible impact on China's developing economy and regulatory system.

This article discusses the historical, cultural, and philosophical values that have helped mold modern China and its powerful and thriving economy and examines how they have helped to shape and influence China's current AML. Rather than following the United States and Europe, China appears to be charting its own course in interpreting and enforcing its competition laws. Based upon China's history, culture, and Confucian ethics and morals, this article forecasts that China's future AML enforcement will be based upon social, moral, and ethical considerations, as well as economic ones.[8] This article concludes that in the coming years, China should continue to follow an evolutionary, rather than a strict, neoclassical economic approach, in dealing with future behavioral and structural competition issues.[9]

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4. *See id.* ch. IV, art. 20–31.

5. *See id.* ch. V, art. 32–37.

6. *See, e.g.*, Thomas J. Horton & Jenny Xiaojin Huang, *Analyzing Information Exchanges between Competitors under the Anti-Monopoly Law*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 1, at 95, 97 ("Although a lot of questions remain to be answered, China's enforcement of the AML has not stagnated.").

7. *See, e.g.*, Mitsuo Matsushita, *Matsushita on China's Anti-Monopoly Law: The First Five Years*, ANTITRUST & COMPETITION POL'Y BLOG (Aug. 12, 2013), *available at* http://lawprofessors.typepad.com/antitrustprof_blog/2013/08/matsushita-on-.html (arguing that "competition policy and law is part of the society in which it operates and necessarily reflects the features of society and politico-economic system of the country"); RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 3 (Rev'd ed. 2000) ("Competition policy has been one of twentieth-century America's most durable goods. Whether in business, politics, sports, or speech, a vision of robust rivalry—of free competition—has inspired our social theories, directed our practices, and informed our public discourse."); Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195, 201 (2006) ("The history of the continuing debates as to antitrust legislation and regulation reveals that how people think about antitrust issues is generally tied to their underlying assumptions and premises, as well as their implied values."); John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y. L. SCH. L. REV. 893, 897 (1990) (arguing that good competition policy must take into account the "social and political values of a just community, the integrity of individualism in that community, and the ideal of equality of economic opportunity.").

8. This article does not seek to review or duplicate the excellent and extensive scholarship addressing the first five years of China's AML enforcement activities and initiatives. *See, e.g.*, HARRIS ET AL., *supra* note 1; CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS, *supra* note 1. Nor should this article be read as a defense of China's one-party Communist government or an attempt to mitigate the serious problems of economic corruption, environmental pollution, or individual and human rights that China must address in the coming decades. A full and fair treatment of such issues is beyond the scope of this article.

9. For detailed discussions of this author's recommended evolutionary approaches to antitrust, *see* Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. 823 (2013) [hereinafter Horton, *Fairness and Antitrust*]; Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615 (2012) [hereinafter Horton, *Antitrust Double Helix*]; and Thomas J. Horton, *The Coming Extinction of*

Part II of this article addresses why China's future AML interpretation and enforcement likely will be guided by social, moral, and ethical considerations, as well as purely economic ones. Section II.A. reviews the diverse and complex economic, political, and social issues facing China today. Section II.A.1. examines the importance to China of its traditional cultural and historical values. As is discussed below, many Chinese fear a westernization of China could undermine its national spirit and transform China into a western appendage. Section II.A.2. then lays out a sampling of the current harsh western criticisms and pressures China faces as it seeks to build and develop its legal system and competition regulation program.

Section II.B. studies China's long history of Confucianism and its effect on Chinese law and government. Section II.B.1. discusses Confucianism, while Section II.B.2. examines the impact of virtue, morality, and the rule of law on Chinese culture. As is demonstrated, Chinese core Confucian values, such as fairness and justice in economic competition, while considered soft and mushy by some western critics, are non-negotiable bedrocks to the Chinese and their leaders. Section II.C., therefore, posits that China is likely to be guided by its unique Confucian history and culture in interpreting and enforcing its AML.

Part III discusses how China has chosen to protect its traditional Confucian morals and values by following an evolutionary approach, instead of a neoclassical economic one, in its AML. The emerging evolutionary approach to antitrust is guided by the exploding fields of evolutionary economics and biology.[10] From a behavioral antitrust perspective, evolutionary theory counsels that morality, ethics, fairness, and reciprocity are crucial to building and sustaining thriving competitive economies.[11] On the structural side, evolutionary theory advises that diversity, variation, and multiplicity are critical to maintaining stable and efficient competitive economic systems.[12]

Section III.A. argues that China's AML is based upon an emerging evolutionary approach, rather than a neoclassical economic approach, to behavioral competition issues. China's emerging evolutionary approach to behavioral competition issues is a natural outgrowth of its determination to build a thriving competitive economy while protecting and

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Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analysis, 42 LOY. U. CHI. L. J. 469 (2011) [hereinafter Horton, *Coming Extinction*].

10. *See, e.g.*, ERIC D. BEINHOCKER, THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS 11 (2006) ("The same process that has driven the growing order and complexity of the biosphere has driven the growing order and complexity of the 'econosphere.'"); *id.* at 16 ("The notion that the economy is an evolutionary system is a radical idea, especially because it directly contradicts much of the standard theory in economics developed over the past one hundred years. It is far from a new idea, however. Evolutionary theory and economics have a long and intertwined history."); Paul J. Zak, *Values and Value: Moral Economics*, in MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 259, 276 (P.J. Zak ed., 2008) (discussing the emerging field of evolutionary economics); James Eggert, Op-Ed, *A Silence of Meadowlarks: Can a Songbird's Demise Lead Us to a Better Economics?* WASH. POST, Aug. 4, 1991, at C3 (arguing that the time is ripe "to incorporate ecological thinking and ecological values with market thinking and values"). It is important to recognize that modern evolutionary theory does not in any way incorporate the outmoded theories of social Darwinism and its biased arguments that "there is a struggle and competition, and the weakest go to the wall." *See* Michael Ruse, *The History of Evolutionary Thought*, EVOLUTION: THE FIRST FOUR BILLION YEARS 1, 29 (Michael Ruse & Joseph Travis, eds., 2009); and Horton, *Coming Extinction*, *supra* note 9, at 479–82.

11. *See, e.g.*, Horton, *Coming Extinction*, *supra* note 9, at 522 (discussing the importance of the evolution of human morality, ethics, fairness, and reciprocity to our thriving free-enterprise system).

12. *See, e.g.*, *id.* at 521 (discussing the importance of diversity, variation, and multiplicity in economic systems).

leveraging its traditional Confucian morals and values. Such an approach implies that China is likely to pursue norms of competitive fairness and corporate social responsibility (CSR) going forward.

Section III.B. contends that China is seeking to pursue the evolutionary objectives of promoting diversity, variety, and multiplicity in its approach to structural competition issues. Such an approach is designed to catalyze and promote the entrepreneurial spirit of its citizens and guard the economic contributions of its vast array of small and medium-sized business enterprises.

China and its leaders surely must confront a daunting array of complex questions and issues in seeking to sustain and leverage China's surging international and domestic economic prowess. As examples, do ongoing issues of economic corruption in China show that China's proclamation of the need to maintain its historic and traditional Confucian ethics and morals is little more than hollow rhetoric? Are China's state-owned enterprises (SOEs) and its desire to protect certain national industries inconsistent with China's asserted support for small and medium-sized business enterprises? No easy answers or solutions await China.

China today faces no shortage of international and domestic criticism concerning its economic and political systems. In the competition arena, for example, critics are urging China to adopt and pursue a western neoclassical economic approach to structural and behavioral competition issues. Facing such questions and criticisms, it may be tempting for China and its AML enforcers to abandon China's Confucianist traditions and morals and China's evolutionary approach to competition issues. China and its competition regulators should resist such temptations and pressures and continue following an evolutionary approach in interpreting and enforcing China's AML.

II. China's AML Enforcement Likely Will be Guided by Social, Moral, and Ethical Considerations

American, European, and Japanese antitrust and competition regulators, lawyers, and economists have taken understandable pride in counseling and helping China in drafting, adopting, and interpreting its new AML.[13] Indeed, "[t]he core provisions of the AML were modeled on EU competition law, and to a lesser extent, on the laws of the United States, Germany, Japan, and other countries."[14]

Nevertheless, in seeking to understand China's AML and to make meaningful scholarly predictions about its interpretation and enforcement, it is critical to realize that China is

13. Noted Chinese competition scholar Professor Xiaoye Wang regards China's AML "as a great achievement of international cooperation." Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L. J. 133, 134 (2008). Professor Wang observes that "[t]he competition enforcement agencies of other countries, in particular the U.S. Department of Justice, the U.S. Federal Trade Commission, and the European Commission contributed significant assistance." *Id.*

14. HARRIS ET AL., *supra* note 1, at 2–3. The authors further note that "[m]any of the stated goals of the AML are broadly consistent with those of such other jurisdictions' laws, including preventing or stopping monopolistic conduct, safeguarding and promoting the order of fair market competition, improving economic efficiency, and protecting the interests of consumers." *Id. See also* Wang, *supra* note 13, at 134 ("[I]t is no surprise that many good provisions from other well-established antitrust laws have been incorporated in the Chinese AML.").

attempting to create and sustain unique legal[15] and economic[16] systems. As a result, it is "necessary and crucial not only to carefully examine the words of the AML, but to read them in the context and light of Chinese history, culture, and traditions."[17] As recognized by former American Antitrust Assistant Attorney General R. Hewitt Pate,

> Whether we like it or not, Chinese antitrust is going to be different from the U.S. and European varieties. Close attention to the underlying conditions and attitudes that will drive Chinese antitrust enforcement will yield more insight than comparing the AML with that of the U.S. and European statutes and court decisions.[18]

Unfortunately, most western antitrust and competition lawyers and economists have little real knowledge of China's rich history and culture. Even such noted Chinese history scholars as John King Fairbank and Merle Goldman have humbly recognized that "[w]e still have much to learn about modern China from her history."[19]

Anyone attempting to understand China's AML and predict its future enforcement must first recognize that the PRC is not a western-style democracy. Some scholars have argued that China may be "the only civilization the world has known upon which Western thought exercised little or no influence at all until modern times."[20] China's historical culture was largely "independent of Western influences" and its responses to its peoples' economic needs are often peculiar to China and sharply differentiated from other countries.[21]

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15. *See, e.g.*, Benjamin Liebman, *Assessing China's Legal Reforms*, 23 COLUM. J. ASIAN L. 17, 31 (2009); *see also* HARRIS ET AL., *supra* note 1, at 3 ("[D]espite strong influences from EU, U.S., and other competition laws, and though it is likely that China will continue to draw upon the experiences of other jurisdictions in interpreting and applying the AML, it must be borne in mind that China's law is a unique piece of legislation directed to China's unique economic and political circumstances, and not borrowed wholesale from the European Union, United States, or any other system.").

16. *See, e.g.*, Matsushita, *supra* note 7, at 1 ("The Chinese economy is a unique hybrid of market and non-market principles and may present a new model for economic systems to developing countries of the world.").

17. Horton & Huang, *supra* note 1, at 98; *see also* HARRIS ET AL., *supra* note 1, at 5 ("Those companies doing business in China must now take measures to ensure those compliance policies address the unique aspects of the AML."); HOWELL ET AL., *supra* note 1, at 54 (In the absence of a global set of competition rules, prescribed by the WTO (World Trade Organization) or otherwise, China "could not, even if it had so chosen, conform its policy regime to a single unitary system of multilateral norms. For China, divergence from at least some national competition regimes has been inescapable.").

18. R. Hewitt Pate, *What I Heard in the Great Hall of the People–Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L. J. 195, 211 (2008); *see also* Matsushita, *supra* note 7, at 1 (arguing that "the features of the AML introduced from Europe will be blended with traditions and values in China as time passes, and ultimately it will provide a model for East Asian or Asian competition laws"); Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 720 (2010). ("This article demonstrates that the transplant in China of a formal antitrust law in the mold of Western antitrust laws takes place under local conditions that are not entirely compatible with Western antitrust models. These local conditions, chiefly the traditional stage China is in, China's market structures, and pervasive state control in China's economy have limited the reach and applicability of the AML. . . . In sum, despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions.").

19. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 381 (2006).

20. NORMAN KOTKER & CHARLES PATRICK FITZGERALD, THE HORIZON HISTORY OF CHINA 10 (Norman Kotker, ed., 1969).

21. *Id.* at 11.

While China's AML shares many aspects of American and European competition law principles, it ultimately serves China's unique socialist political-legal system.[22] Article 1 of China's AML boldly proclaims that one of its major purposes is "protecting the consumer and public interests, and promoting the healthy development of the socialist market economy."[23] Article 4 adds that "[t]he State shall formulate and implement competition rules compatible with the socialist market economy, perfect macroeconomic supervision and control, and develop a united, open, competitive, and orderly market system."[24] Some may argue that such bold pronouncements and objectives are inconsistent with the realities of life today in China and the feelings of China's citizenry, many of whom seem to welcome unbridled western capitalism. Nevertheless, such pronouncements reveal that future competition policy decisions in China "are likely to be influenced as much or more by China's unique culture and history, as by the influences of competition laws and decisions in the EU, the United States, and other jurisdictions."[25]

This section addresses the various cultural, historical, and social considerations that are likely to impact and influence China's future AML enforcement. Section II.A.1. first discusses China's strong interest in protecting its unique cultural and social values. Section II.A.2. next reviews the key political and economic western and global criticisms of China's AML enforcement activities to date. Section II.B. then analyzes the historical and cultural impact of Confucianism on China's laws and regulations. The relationship of virtue and law in Chinese culture is examined, as well as Chinese conceptions of public and personal morality. Section III.C. discusses why it is likely that China will be guided heavily by its own long history and Confucian traditions in pursuing its future AML enforcement path.

A. Economic, Political, and Social Issues Facing China Today

Scholars have struggled to fully understand and define China's current diverse and complex political, economic, and legal systems.[26] "[T]he shape of the market economy that China wishes to adopt has remained unresolved," and the Chinese themselves "are struggling with issues, including the appropriate norms of competition, that have long been the subject of controversy within and between capitalist systems."[27] This is not surprising, as

22. *See* Horton & Huang, *supra* note 1, at 98; Ignazio Castelluci, *Rule of Law with Chinese Characteristics*, 13 Ann. Surv. Int'l & Comp. L. 35, 83–84 (2007).

23. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz 68, ch. II, art. 13–16 (China).

24. *Id.* art. 4.

25. Horton & Huang, *supra* note 1, at 98.

26. *See, e.g.*, Fairbank & Goldman, *supra* note 19, at 464–69. The authors observe that while China's "market economy and openness to the outside world [have] loosened the all-encompassing controls of the Mao years, allowing far more intellectual diversity and personal freedom," China is "still an authoritarian state" and its "communist party-state remains in power." *Id.* at 465. They add, "[t]he continuing move to the market and the open-door policies that have led to China's weakening party-state might in time bring about a freer, more democratic society as China's population becomes more prosperous and begins to demand greater rights. . . . Yet the development of appropriate political institutions, such as local elections and the efforts to establish the rule of law, is only at an embryonic stage in China, and could easily be arrested." *Id.* at 469.

27. Scott Kennedy, *The Price of Competition: Pricing Policies and the Struggle to Define China's Economic System*, 49 The China J. 1 (2003).

China is attempting to achieve full economic modernization without the representative democratic governments and institutions found in most western capitalist countries.[28] Moreover, China is attempting to embrace and exploit the economic gains of western-style capitalism while preserving "certain immutable values."[29]

1. *Preserving and Protecting China's Traditional Cultural and Historical Values*

Protecting and preserving its immutable cultural, historical, and social values is paramount in China's mind. "Countries all over the world differ greatly in terms of economic development, legal systems, cultural standards, and individual's perception of ethics."[30] China is no exception. The Chinese are rightfully proud of their unique cultural history and values, which they believe to be a superior glue that has helped hold together their great civilization for thousands of years.[31] Some Chinese critics have gone so far as to accuse their countrymen of "extreme arrogance" in lauding their Chinese values.[32]

The Chinese Communist Party's (CCP) leaders recognize that China's recent economic reforms and staggering successes have unleashed potential social, cultural, and economic tensions that could threaten China's societal harmony.[33] "A pervasive sense of insecurity about the future" and a fear of chaos have "haunted the Chinese people since time immemorial."[34] Many in China have long been "appalled by the social evils of unbridled capitalism and extreme individualism in the West."[35]

Underlying such fears and tensions is a long history of destructive imperialism in China, which has led to "social disruption and psychological demoralization" and, at times,

28. *See* FAIRBANK & GOLDMAN, *supra* note 19, at 1.

29. JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA xx (1990).

30. Lin Ge & Stuart Thomas, *A Cross-Cultural Comparison of the Deliberative Reasoning of Canadian and Chinese Accounting Students*, 82 J. BUS. ETHICS 189, 190 (2008). The authors further observe that "[d]ifferent cultural backgrounds lead to various ways of perceiving the world, and therefore, individuals in different cultures may come to different conclusions when resolving ethical dilemmas." *Id.* The famous anthropologist Franz Boas and his followers (including Melville J. Herskovitz and Margaret Mead), believed that "moral values are relative to each culture, and that there is no way of showing that the values of one culture are better than those of another." Marian Eabrasu, *A Moral Pluralist Perspective on Corporate Social Responsibility: From Good to Controversial Practices*, 110 J. BUS. ETHICS 429 (2012).

31. *See, e.g.*, FAIRBANK & GOLDMAN, *supra* note 19, at 25 ("Because the Asian invaders became more powerful as warriors, the Chinese found their refuge in social institutions and feelings of cultural and aesthetic superiority–something that alien conquest could not take away."); *id.* at 14 (China "is held together by a way of life and a system of government much more deeply rooted than our own, and stretching further back uninterruptedly into the past.").

32. *See, e.g.*, SPENCE, *supra* note 29, at 720 (quoting BO YANG, SEEDS OF FIRE: CHINESE VOICES OF CONSCIENCE 174 (Geremie Barmé & John Minford, eds., 1989)).

33. *See, e.g.*, Geoffrey Kok Heng See, *Harmonious Society and Chinese CSR: Is There Really a Link?* 89 J. BUS. ETHICS 1, 2 (2009) (arguing that addressing China's social and economic issues "is a top national priority because these problems have resulted in social instability that threatens the CCP's grip on power. The CCP recognizes that it could lose political legitimacy if it fails to respond to these problems effectively.").

34. FAIRBANK & GOLDMAN, *supra* note 19, at 439.

35. Edmund S. K. Fung, *State Building, Capitalist Development, and Social Justice: Social Democracy in China's Modern Transformation, 1921-1949*, 31 MODERN CHINA 318, 320 (2005); *see also id.* at 444 (discussing Chinese beliefs that "a revived Confucianism could provide the intellectual and cultural underpinnings for China's rapid economic development while helping China avoid the immorality and individualism of western capitalism").

threatened China's "entire way of life."[36] Understandably, many Chinese fear a "Westernization" of China that could undermine China's national spirit and transform China into a western appendage.[37] Indeed, in late nineteenth-century China, a self-strengthening movement arose with the dual objectives of learning from and adopting western technologies and economic theories, while maintaining China's traditional cultural and social values.[38]

Behind China's fears of "Westernization" lies the stark reality that there are substantial cultural disconnects between the United States (and many other western nations) and China that cannot be ignored or easily subsumed. For example, cross-cultural comparisons between traditional western cultures and the PRC have received substantial attention in recent years.[39] Such studies have revealed dramatic differences in the cultural values of individualism and collectivism in the United States and China.[40] "These differences reflect the common assertion that advanced Western societies are very individualistic, while Asian cultures have a more collective orientation."[41] Historians John King Fairbank and Merle Goldman observe that "[l]iving so closely with family members and neighbors has accustomed the Chinese people to a collective life in which the group normally dominates the individual."[42] In the words of the now-deceased China scholar Professor Lucian W. Pye, "[a]t the core of Chinese ethics and morality there has always been the ideal of depressing self-interest and glorifying self-sacrifice for the collectivity."[43]

Many Chinese believe that their culture more strongly embraces humanism as an ideal than western cultures. The Chinese "have always had a very strong humanist outlook."[44]

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36. FAIRBANK & GOLDMAN, *supra* note 19, at 189 ("Today's historians are more likely to stress the social disruption and psychological demoralization caused by foreign imperialism. In these dimensions the long-term foreign invasion[s] of China proved to be a disaster so comprehensive and appalling that we are still incapable of fully describing it."); *see also* MICHAEL BURLEIGH, MORAL COMBAT: GOOD AND EVIL IN WWII 14–21 (2011) (describing Japan's horrific invasion of China in World War II and racism towards the Chinese); IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1997) (describing the horrors of Japan's invasion of Nanking during World War II).

37. *See* SPENCE, *supra* note 29, at 643 (quoting Shannon Brown, *China's Program of Technology Acquisition*, *in* CHINA'S FOUR MODERNIZATIONS 159–163 (Richard Baum ed., 1980)).

38. FAIRBANK & GOLDMAN, *supra* note 19, at 408.

39. *See, e.g.*, William E. Shafer, Kyoko Fukukawa & Grace Meina Lee, *Values and the Perceived Importance of Ethics and Social Responsibility: The U.S. Versus China*, 70 J. BUS. ETHICS 265 (2007); Vivienne Brand & Amy Slater, *Using a Qualitative Approach to Gain Insights into the Business Ethics Experiences of Australian Managers in China*, 45 J. BUS. ETHICS 167 (2003).

40. *See, e.g.*, Shafer et al., *supra* note 39, at 267.

41. *Id.* at 267. The authors add that "the collectivistic orientation of Chinese societies is often attributed to the influence of Confucianism, with its emphasis on respect for brotherhood, social harmony, and the protection of the interests of one's in-group. . . . The second striking difference is also a reflection of influence of traditional Confucian values–the Confucian dynamism dimension. Hong Kong and Taiwan ranked 2, and 3, respectively on long-term orientation. The U.S., in contrast, ranked 27." *Id.*

42. FAIRBANK & GOLDMAN, *supra* note 19, at 17. Professors Fairbank and Goldman add that "one generalization in the lore about China is the absorption of the individual not only in the world of nature but also in the social collectivity." *Id. See also id.* at 258 ("Individualism and liberalism in Chinese thinking were strictly limited parts of a larger collectivity. The Chinese individual was subordinate to the group.").

43. Lucian W. Pye, *The State and the Individual: An Overview Interpretation*, 127 THE CHINA Q. 443, 444 (1991) [hereinafter Pye, *The State and the Individual*]. Pye further notes that "[t]he Chinese instinct has indeed been to see individualism as nothing more than self-centeredness." *Id.* at 447.

44. FITZGERALD & KOTKER, *supra* note 20, at 116. The authors further observe that "[t]he Chinese are not a religious people. The bent of their minds has always been humanist." *Id.* at 127. American history, by

Conversely, some Chinese scholars have argued that the Western "culture of individualism is morally vacuous and socially irresponsible."[45]

The Chinese concept of law also is "fundamentally different from legal conceptions in the West."[46] Unlike western laws, Chinese law draws heavily upon the legal philosophies of Confucianism.[47] In addition, the "regulatory culture in China tends to emphasize a dynamic by which governance is pursued by a sovereign political authority that remains largely immune to challenge."[48] Furthermore, "[t]he Chinese have a less clear and inflexible demarcation between right and wrong. There are no obviously wrong areas of life. . . . Moderation is the key, not prohibition."[49] In short, "the Chinese notion of the role of law differs from its western counterpart[s], based on two main factors: China's socialist experience and its unique history."[50]

It is important for westerners to understand that China is intensely proud and protective of its unique cultural, social, and legal values and traditions. In pursuing its socialist market economy and "popular democracy," China does not want to be "the tail of someone else's dog."[51] It has "never been easy" for foreigners to fully understand or work with

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contrast, shows a deep religiosity and compunction for protecting the free exercise of religion. *See, e.g.*, PERRY MILLER, ERRAND INTO THE WILDERNESS 142 (1956); MERLE CURTI, THE GROWTH OF AMERICAN THOUGHT 3 (3d ed. 1964) ("The Christian tradition, introduced by the first comers, reinforced by nearly all their European successors, and perpetuated by conscious effort, was the chief foundation stone of American intellectual development. No intellectual interest served so effectively as Christian thought to bring some degree of unity to the different classes, regions, and ethnic groups."); ANDREW DELBANCO, THE PURITAN ORDEAL 91 (1991) (describing the belief that "God had appointed America as the place where he would . . . establish the throne of David's kingdom") (quoting John Cotton, *God's Promise to His Plantation* 7 (1630); THE SUPREME COURT ON CHURCH AND STATE (Robert S. Alley, ed., 1988)).

45. Pye, *The State and the Individual, supra* note 43, at 447 (quoting Zhao Fusan, *Some Thoughts on Certain Aspects of Modern Western Culture: Reading Notes*, PEOPLE'S DAILY) (as quoted by Richard Madsen, *The Spiritual Crisis of China's Intellectuals, in* CHINESE SOCIETY ON THE EVE OF TIANANMEN: THE IMPACT OF REFORM 247 (D. Davis & E. Vogel, eds., 1990)).

46. FAIRBANK & GOLDMAN, *supra* note 19, at 183. The authors explain that in China, the laws "came from the moral character of the natural universe itself, from this world, not from another world beyond human ken. . . . So the breaking of such rules was a matter of practical expedience rather than of religious principle. Laws were subordinate to morality. Their sanction lay in reason or the common social experience that underlay morals. This system avoided the unhappy dualism that grew up in the West between the letter of the law and the dictates of commonsense morality." *Id.*

47. *See, e.g.*, Jun Shzo & Ming Hu, *A Comparative Study of the Legal Education System in the United States and China and the Reform of Legal Education in China*, 35 SUFFOLK TRANSNAT'L L. REV. 329, 331 (2012).

48. Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119, 124 – 25 (2003); *see also* Castellucci, *supra* note 22, at 64 (observing that "[a] 'socialist' rule of law still implies the guiding role of a single, or preeminent, party over the political and legal system, as well as the prevalence of common interest over individual ones, and other fundamental [Chinese] values.").

49. Jatinder J. Singh, Scott J. Vitell, Jamal Al-Khatib & Irvine Clark III, *The Role of Moral Intensity and Personal Moral Philosophies in the Ethical Decision Making of Marketers: A Cross-Cultural Comparison of China and the United States*, 15 J. INT'L. MARKETING 86, 105 (2007).

50. Castellucci, *supra* note 22, at 36. Professor Castellucci further concludes that "China's popular democracy and Western liberal democracies [are] two different things." *Id.* at 64.

51. *See* FAIRBANK & GOLDMAN, *supra* note 19, at 322 ("The final factor making for sinification was the overriding sentiment of Chinese nationalism based on cultural and historical pride, which meant that China could not be the tail of someone else's dog. In effect, the Chinese people could accept only a Chinese Marxism.").

the Chinese Revolution.[52] But there can be little doubt that China will work vigorously to protect its unique historical and cultural values despite often-strident criticism from the West.

2. *Western Criticisms and Pressures on China*

As China moves forward with its AML regulation, it faces no shortage of criticism from western antitrust practitioners and scholars, as well as its own growing body of competition scholars and practitioners. Generally, these criticisms can be lumped into three broad categories: (1) China's government and regulations tend to suppress individual rights and initiatives; (2) China's economy needs to be less state-driven; and (3) China's AML and its enforcers are driven less by a concern for protecting competition than by promoting various social policies and issues. These criticisms are discussed below.

a. China's Suppression of Individual Rights and Initiatives

Modern China and the CCP have been extensively criticized from within and without for suppressing and even destroying individual rights and initiatives. Such criticisms began shortly after Mao Zedong and the CCP's ascension to power. For example, Chinese intellectual writer Ding Ling wrote stories about how the CCP was "enforcing an ideological outlook that destroyed individual initiative and opinion."[53] Western critics followed Ding Ling by branding the Chinese as "robotlike followers."[54]

Even more graphically, Professor Lucian W. Pye strongly questioned China's seeming belief that "economic growth can occur without the individualism associated with pluralistic democracy."[55] Professor Pye disputed the alleged superiority of Asian and Chinese "values [that] differ from Western ones in their emphasis on the community rather than the individual."[56] From Professor Pye's perspective, a "huge gap" exists in China between the community of citizens and the level of the state.[57] Professor Pye argued, "[t]he world of the citizen and that of the government remain far apart in a non-democratic Asia. To define the state as the only legitimate community, and thus deprive citizens of individual rights, comes close to advancing a fascist ideology."[58]

Professor Pye concluded by questioning China's ability to "build a new 'spiritual civilization' and 'socialism with Chinese characteristics'" without increasing individual rights and freedoms, and accepting "the need for society as a whole to take a lead in this quest."[59]

b. China's State-Driven Economy

A corollary criticism to the lack of individual rights in China is that China's economy is too state-driven and controlled. As an example, Chinese-law expert Donald C. Clarke wrote in 2007 "that China's path so far has been almost exclusively that of the model of

52. *See id.* at 327 ("For foreigners to work with the Chinese Revolution has never been easy.").
53. SPENCE, *supra* note 29, at 473.
54. *Id.* at 532.
55. Lucian W. Pye, *Civility, Social Capital, and Civil Society: Three Powerful Concepts for Explaining Asia*, 29 J. INTERDISCIPLINARY HISTORY 763 (1999) [hereinafter Pye, *Civility*].
56. *Id.* at 781.
57. *Id.*
58. *Id.*
59. *Id.*

state-driven development, and that more balance is desirable."[60] Professor Clarke questions whether China will really succeed in creating a true market economy by stating,

> Taken together, these developments hint that it is too early to assume that the path to further reform is clear and largely uncontested. Opposition to further reforms in the direction of markets and increased openings for the private sector may be more deep-rooted than hitherto supposed, and this opposition might be able to link up with the strain of economic nationalism demonstrated in the controversy over acquisitions of Chinese firms.[61]

Following Professor Clarke, other critics have raised questions concerning the independence of China's new regulatory structure. For example, Professor Margaret M. Pearson argues that, "while impressive changes during the past decade have given the agencies that regulate China's strategic industries the initial *appearance* of independent regulators, the actual *function* of an independent regulatory structure is far from established."[62] Professor Pearson adds that "the state has positioned itself as a crucial player at the commanding heights of China's economy; in that realm, regulatory reform has sustained, rather than attenuated, government control."[63]

Criticisms of China's repressive economic oversight recently crescendoed with Google's drastic decision to withdraw from mainland China.[64] Google's decision was catalyzed by Chinese government censorship.[65] Professors Justin and Ann E. Tan noted that "[b]oth Yahoo! and Microsoft faced similar scenarios in China when forced to choose between complying with the repressive censorship policies or defying the laws of the host country."[66] Professors Tan and Tan conclude from Google's travails that the "need to comply with and capitulate to state demands" in China "seems heightened, especially considering its increasing importance as an international market, but continued status as a repressive, authoritarian system of social control."[67]

3. *Criticisms of China's AML and its Enforcement*

Numerous scholars and practitioners have criticized China's AML and its first five years of enforcement. A leading criticism is that instead of focusing on simply increasing competition, China's AML attempts to achieve too many social objectives that could be better

60. Donald C. Clarke, *Legislating for a Market Economy in China*, 191 THE CHINA Q. 567, 568 (2007).

61. *Id.* at 577.

62. Margaret M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, 57 WORLD POL. 296, 297 (2005). In fairness, Professor Pearson points out that "[t]here is substantial evidence that Chinese reformers are striving to move toward the independent regulator model." *Id.* at 301.

63. *Id.* at 321. Professor Pearson predicts a continued "reformulated role for strong state oversight at the highest levels." *Id.* at 322.

64. Justin Tan & Anna E. Tan, *Business Under Threat, Technology Under Attack, Ethics Under Fire: The Experience of Google in China*, J. BUS. ETHICS (forthcoming), *available at* http://ideas.repec.org/a/kap/jbuset/v110y2012i4p469-479.html.

65. *Id.*

66. *Id.*

67. *Id.* Professors Tan and Tan go on to brand China as a "repressive regime that simultaneously fosters and hinders [rapid economic development]." *Id.*

handled outside the AML's domain.[68] Even before the AML was passed in 2008, western critics—like Professor Clarke and the American Bar Association (ABA)—worried that China's AML was hoping to achieve such social objectives as fair prices.[69] Following this line, on May 3, 2013, Reuters reported criticisms that in enforcing its AML, China was "appearing to use industrial policy protection rather than consumer protection as a benchmark."[70]

A strong undercurrent of many of the western criticisms of China's AML and its enforcement is that China is not following the conservative economic agenda that has dominated American antitrust since the 1980s.[71] As an example, Professor Wentong Zheng criticizes China for favoring "duplication of industries at the provincial level," as well as for its "generally low market concentration ratios" and "low economies of scale."[72] On April 23, 2013, a Harvard Business Law Review article echoed Professor Zheng's concerns by blasting China for having too much production "from small companies that possessed no scale economies."[73] Professor Zheng concluded that "in all three major areas of antitrust—cartels, abuse of dominant market position, and merger review—China's local conditions have prevented the AML from becoming an integral part of China's competition policy."[74]

China's objectives of promoting economic stability and fairness also have come under strong attack. Professor Benjamin van Rooij, for example, believes that China's economic regulation is too focused on stability.[75] Others question what they call "an infatuation, common in Asia, with 'fairness.'"[76] Professor Liu believes that the "[l]ack of a strong

68. *See* Clarke, *supra* note 60, at 581.

69. *See id.*

70. Michael Martina, *Insight: Flexing Antitrust Muscle, China Is a New Merger Hurdle*, REUTERS (May 2, 2013, 5:10 PM), http://www.reuters.com/article/2013/05/02/us-mergers-regulation-china-insight-idUSBRE94116920130502. The article adds that China's merger enforcement agency (MOFCOM) is forced to heed powerful demands from above that are "less concerned with promoting competition and consumer welfare than with carving out space for domestic champions." *Id.*

71. *See, e.g.*, Horton, *Fairness and Antitrust*, *supra* note 9, at 825 – 26 ("Economics rules antitrust today. Jurists and scholars favoring economic 'consumer welfare' considerations and disfavoring fairness considerations in antitrust analyses are ascendant. Allocative efficiency is positively equated with consumer welfare."); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 563–66 (2012) (discussing the ascendance of Chicago School's neoclassical theories in antitrust jurisprudence since the late 1970s); Jesse W. Markham, Jr., *Lessons for Competition Law From the Economic Crisis: The Prospect for Antitrust Responses to the 'Too-Big-to-Fail' Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 278–81 (2011) ("The current state of antitrust law is often referred to as embracing 'Post-Chicago School' economic theory. Post-Chicago School antitrust is the stepchild of Chicago School antitrust . . . post-Chicago antitrust theory departs from the Chicago School views mostly around the margins.").

72. Zheng, *supra* note 18, at 659; *see also id.* at 658 ("The duplication of industries at the local level also led to loss of economies of scale . . . examples of low economies of scale abound in China's economy.").

73. Ushua C.V. Haley & George T. Haley, *How Chinese Subsidies Changed the World*, HARV. BUS. REV. (Apr. 25, 2013, 8:00 AM), http://blogs.hbr.org/2013/04/how-chinese-subsidies-changed/.

74. Zheng, *supra* note 18, at 671. Professor Zheng also criticizes the "staggering levels" of excess capacity in many of China's industries. *Id.* at 675.

75. Benjamin Van Rooij, *The People's Regulation: Citizens and Implementation of Law in China*, 25 COLUM. J. ASIAN L. 116, 116 (2012) ("China's halfhearted approach to regulatory governance with its focus on stability may ultimately be destabilizing.").

76. *See, e.g.*, Lawrence S. Liu, *All About Fair Trade?—Competition Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259, 259 (2012). Professor Liu warns China of the difficult road ahead "if the mandate in the competition law includes fairness-based goals." *Id.* at 261.

political commitment to robust competition laws, while clinging to fuzzy notions of fairness, can reduce the predictability of [Chinese] law enforcement."[77]

Western antitrust practitioners have joined scholars in attacking China's refusal to follow Western neoclassical economic thinking. As an example, in 2009, four American antitrust practitioners urged that "China's AML frequently reflects principles similar to those once embedded in U.S. antitrust policy, but which have been abandoned or modified by U.S. policymakers and courts in a sustained process of policymaking through trial and error."[78] The authors criticize China's AML abuse of dominance provisions as "bear[ing] a closer resemblance to U.S. antitrust policies of the 1940s through the 1960s than to the current policy."[79]

Much of the western criticism of China's AML and its ongoing enforcement reveals a fundamental lack of understanding of China's history and culture. For example, many American commentators urge that "Chinese law suffers from excessive generality and vagueness."[80] Yet, "[t]he Chinese language, itself an extension of the tenets and qualities of Confucianism, is heavily dependent on context."[81] Similarly, the Chinese idea of a moral community, which has its basis in Confucianism, is "often difficult for outsiders to grasp."[82]

B. Confucianism and Chinese Law

An attempt to fully describe Chinese Confucianism is beyond the scope of this article. Nevertheless, enough generalizations can be safely drawn to begin appreciating the potential long-term impacts of Confucianism and Chinese culture on China's AML and its future enforcement.

1. *Chinese Confucianism*

Modern China abounds with shrines to Confucius, the founding father of China's ethical system.[83] Confucius lived in China between 551 and 479 B.C.[84] Confucius's writings

77. *Id.* at 301. Professor Liu continues, "The tendency in large Asian economies to pursue fairness in designing or implementing a competition law regime could have profound—and not necessarily benign—ramifications across the region, around the world, and indeed for their own long-term development." *Id.*

78. Howell et al., *supra* note 1, at 53. The authors add that "[t]he areas of divergence from U.S. antitrust practice recall an earlier era in the United States, when antitrust was an expression of popular anxieties, political and social values, and a system of economic regulation." *Id.* at 95. They further urge China to avoid "what appear[s] to have been some wrong turns by U.S. antitrust policy in the past . . . ." *Id.*

79. *Id.* at 68. The authors proudly proclaim that "[i]n general, U.S. antitrust policy has evolved from a system of regulation based on political, social, and ideological considerations to one premised on modern economic principles." *Id.* at 54. Not discussed is whether Chicago School economic principles themselves might be little more than political, social, and ideological considerations dressed up in pseudo-scientific garb. *See, e.g.*, Horton, *Antitrust Double Helix*, *supra* note 9, at 670 ("The Chicago/Harvard antitrust double helix has provided the philosophical basis for the diminished enforcement of our antitrust law for more than thirty years.").

80. Micaela Tucker, *"Guanxi!"—"Gesundheit!" An Alternative View of the "Rule of Law" Panacea in China*, 35 Vt. L. Rev. 689, 711 (2011) (citations omitted).

81. *Id.* The author adds that "[v]iewed from a Confucian perspective, this allows language and its referents to be flexible to the needs of the speaker." *Id.*

82. *See* Fairbank & Goldman, *supra* note 19, at 274.

83. *See, e.g.*, Spence, *supra* note 29, at 8.

and works "have held a predominant role in Chinese culture for millenniums."[85] Confucianism is not a religion, but a secular philosophy.[86] Buddhism, with its tenets of universal compassion and tolerance, has "been the religion of the majority of the Chinese people for centuries."[87] Buddhism does not conflict with Confucianism and its secular code of civic values, but instead complements it.[88]

Confucius lived in a turbulent time of chaos, treachery, and corruption in China and "[h]is whole effort was directed toward trying to arrest a swift decline in political practice and public morality."[89] Through his own exemplary life and works, Confucius "left behind a new understanding of ethics, an ideal of the aristocrat as a man of morality: just, sincere, loyal, benevolent, and owing his high esteem to the possession and practice of these virtues, not to his birth or wealth."[90] "Man must be guided by morality, by virtues, and not just by the knowledge of how to perform rites."[91] Harmony is a core principle of Confucianism, and secular ethics and morality are crucial to maintaining harmonious societal relationships.[92] "As Confucius saw it, maintaining the harmonious functioning of the social order was—or ought to be—the supreme objective of any man's life."[93]

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84. *Id. See also* FITZGERALD & KOTKER, *supra* note 20, at 65.

85. FITZGERALD & KOTKER, *supra* note 20, at 65. Confucius's *The Analects* also known as *The Lun Yü*, "is a record of Confucius' personal teaching, compiled by his original disciples." *Id.* "Only the *Analects* can be said to be the work, albeit indirectly, of Confucius himself. It is a collection of his sayings and teaching, and is accepted as basically the work of his immediate disciples, although it was probably expanded in later times, perhaps from oral tradition. Almost all that is certain about Confucius' life and teaching comes from the *Analects*. The greatness of Confucius does not rest upon the attributed authorship or editorship of well-known works, but on his method and his approach to moral problems." *Id.*

86. *See, e.g., id.* at 183 ("Unlike China's two other great systems of thought–Buddhism and Taoism–which were essentially contemplative and largely mystical, Confucianism [is] profoundly activist and so secularly oriented that it can scarcely be described as a religion."). *See also* JAMES MANNION, ESSENTIALS OF PHILOSOPHY: THE BASIC CONCEPTS OF THE WORLD'S GREATEST THINKERS 178 (2006); and THOMAS FRONCEK, THE HORIZON BOOK OF THE ARTS OF CHINA 39 (1969) ("Confucianism, which dominated Chinese thought after the second century B.C., is more of a code of ethics than a religion. Its followers do without priests, images or deities–although Confucius himself is sometimes worshipped as a sage.").

87. GAVIN MENZIES, 1421: THE YEAR CHINA DISCOVERED AMERICA 39 (2002).

88. *See id.*

89. FITZGERALD & KOTKER, *supra* note 20, at 67; *see also* MANNION, *supra* note 86, at 177 ("[Confucius] lived in a time of chaos and corruption in ancient China, and his philosophy stressed the ethical in interpersonal and political relations and family values. . . . The leaders should be of exemplary moral fiber . . . .").

90. FITZGERALD & KOTKER, *supra* note 20, at 20; *see also* MANNION, *supra* note 86, at 178 (Confucius "concluded that five virtues were what one needs to live a good life: compassion, decency, good manners, insight, and fidelity.").

91. FITZGERALD & KOTKER, *supra* note 20, at 65. *See also* Edward J. Romar, *Globalization, Ethics, and Opportunism: A Confucian View of Business Relationships*, 14 BUS. ETHICS Q. 663, 667 (2004) ("Confucianism is based upon the virtues of trust, honesty and benevolence and is relational and hierarchical."); and Shafer et al., *Values and the Perceived Importance of Ethics*, *supra* note 39, at 267 ("Several distinct values are associated with Confucian dynamism, including persistence (perseverance), personal steadiness (reliability), ordering relationships, thrift, a sense of shame, respect for tradition, protecting your face, and reciprocation.") (citations omitted).

92. *See, e.g.*, Lei Wang & Heikki Juslin, *The Impact of Chinese Culture on Corporate Social Responsibility: The Harmony Approach*, 88 J. BUS. ETHICS 433, 440–41 (2009) ("Harmony is [Confucianism's] central principle, the overall goal of ancient Confucianism being to focus on secular ethics and morality, and educate people to be self-motivated and self-controlled to assume responsibilities, which leads to self-cultivation and a harmonious society.").

93. FITZGERALD & KOTKER, *supra* note 20, at 183.

"As a virtue ethic, the Confucian Way governs all aspects of human behavior and ethics cannot be separated from any individual activity."[94] Reciprocity and reciprocal virtuous behavior are key virtues in Confucianism.[95] Through its concern with reciprocity and social harmony, "Confucianism focuse[s] on the structure and the needs of the society at large."[96]

In looking out for the needs of the society at large, individuals following the Confucian way embrace "a deep moral concern and altruistic commitment towards others and society."[97] Included in this societal concern is a sense of "distributive justice," which "implies a fair acquisition and distribution of resources."[98] It also includes the principle of "non-maleficence."[99]

After the firm establishment of the Han dynasty in 206 B.C., "Confucians won the leading place in the esteem of the new emperors, and Confucianism became the orthodox doctrine of the Chinese world."[100] Today, more than 2,000 years later, the traditional values of Confucianism still "are ingrained in the Chinese way of life and affect Chinese people's perceptions of what is important and what is not."[101] Confucianism continues to be "a dominant and enduring influence on cultural values in China despite the economic

94. Romar, *supra* note 91, at 668.

95. *See, e.g.*, Wang & Juslin, *supra* note 92, at 442 ("Confucianism believes that virtuous behavior towards others lies in reciprocity. . . . Confucius called reciprocity as 'shu,' which thought is the fundamental moral principle which could guide a person through life, saying: 'never impose on others what you would not choose for yourself'") (CONFUCIUS, ANALECTS 15:24); Gary Kok Yew Chan, *The Relevance and Value of Confucianism in Contemporary Business Ethics*, 77 J. BUS. ETHICS 347, 353 (2008) ("According to the ANALECTS (Book VI, Number 28), the person who abides by the principle of reciprocity is a man of humanity."); FITZGERALD & KOTKER, *supra* note 20, at 183 ("Every man was also under a moral, legal, and social obligation to practice *jên*, or 'human heartedness,' in his dealings with others. *Jên*–or 'virtue of the soul,' as it was also known–was the central concept of Confucianism."); and Joseph P. Schultz, *Reciprocity in Confucian and Rabbinic Ethics*, 2 J. RELIGIOUS ETHICS 143, 144 (1974) ("Reciprocity is the basis for all human relations in the Confucian social order . . . Confucius himself expressed the idea of mutuality in social relationships . . . .").

96. FITZGERALD & KOTKER, *supra* note 20, at 183.

97. D. F-C. Tsai, *The Bioethical Principles and Confucius' Moral Philosophy*, 31 J. MED. ETHICS 159, 161 (2005). The Confucian also "values his relatedness, mutuality, and communion with others more than his own separateness, individuality, and distinctiveness." *Id.* Indeed, "[w]hen there are conflicts between public interest and self interest, individual benefits and moral principles, *yi* as justice maintains the prioritization of: first, justice; second, profit (first, the public interest; second, the self interest) according to Confucius." *Id. See also* Karyn Lai, *Understanding Confucian Ethics: Reflections on Moral Development*, 9 AUSTL. J. PROF. & APPLIED ETHICS 21, 24 (2007) ("Confucian moral development involves the cultivation of a deep commitment to human welfare.").

98. Tsai, *supra* note 97, at 161. Confucian values required that "[r]elieving people's poverty ought to be handled as though one were rescuing them from fire or saving them from drowning. One cannot hesitate." THE DICTIONARY OF MING BIOGRAPHY 338 (L. Carrington Goodrich ed., 1976). For several excellent critiques of how far modern America has fallen from such an idea, see JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012); *see also* KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1991).

99. Tsai, *supra* note 97, at 161. "[N]on-maleficence is a perfect duty that everyone should not transgress, while beneficence is a moral ideal . . . ." *Id.*

100. KOTKER & FITZGERALD, *supra* note 20, at 75.

101. George Lan, Zhenzhong Ma, JianAn Cao & He Zhang, *A Comparison of Personal Values of Chinese Accounting Practitioners and Students*, 88 J. BUS. ETHICS 59, 62 (2009).

and political upheavals in the last two centuries."[102] As an example, in the 1990s, when "a small number of older [Communist] ideologues [sought] to resuscitate Mao's ideas," a larger group of Chinese scholars and young individuals instead turned back to the shared Confucian values they credited for the Asian economic miracles of the 1980s and 1990s.[103]

Western philosophies long have admired and praised Chinese Confucian morality and ethics. For example, the eighteenth century French Jesuits urged "that the ethical content of the Confucian Classics proved the Chinese were a deeply moral nation."[104] Voltaire even went so far as to assert that the morality and ethics of the Chinese showed "it was obviously possible for a country to get along admirably without the presence of Catholic clerical power."[105] Even earlier, in 1699, the German mathematician and philosopher Gottfried William Liebniz asserted the superiority of the Chinese and their Confucian culture and ideals to western ethics and politics.[106] The Dutch scholar Isaac Vossius and the Flemish Jesuit Father Nicholas Trigault similarly praised the Chinese for their peacefulness and their conduct toward neighboring countries.[107]

In understanding and assessing the current western criticisms of China's AML and its enforcement, it is crucial to appreciate how different Chinese Confucianism and morals are from the current American neoclassical economic and individualistic philosophies that largely have driven American antitrust enforcement since the 1980s.[108] In the United States, some scholars have argued that antitrust should have no ethical or moral compo-

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102. *Id.*

103. FAIRBANK & GOLDMAN, *supra* note 19, at 441.

104. SPENCE, *supra* note 29, at 133.

105. *Id.*

106. *See* ARTHUR O. LOVEJOY, ESSAYS IN THE HISTORY OF IDEAS 105 (Capricorn Books ed. 1960). Liebniz wrote in part, "we now experience in the case of the Chinese . . . be it said almost with shame–we are beaten by them–that is, in the principles of Ethics and Politics. For it is impossible to describe how beautifully everything in the laws of the Chinese, more than in those of other peoples, is directed to the achievement of public tranquility, to that good order in the relations of men to one another whereby each is in the least degree injurious to the others." *Id.* at 105–06 (quoting GOTTFRIED WILLIAM LIEBNIZ, NOVISSIMA SINICA (trans., 2d ed., 1724)). Liebniz went on to recommend and promote the project of a joint Chinese-European Academy of Science, in which Western philosophies would be compared to Chinese Confucianism. He urged, "If this should be carried out, I fear lest we soon be inferior to the Chinese in everything that is deserving of praise. I say this, not because I envy them any new light–on that I should rather congratulate them–but because it is to be desired that we, on our side, should learn from them those things which hitherto have, rather, been lacking in our affairs, especially the use of practical philosophy and an improved understanding of how to live. . . . I believe that if a wise man were chosen to pass judgment, not upon the shapes of goddesses, but upon the excellence of peoples, he would award the golden apple to the Chinese . . . ." *Id.* at 126.

107. LOVEJOY, *supra* note 106, at 104–05 (quoting ISAAC VOSSIUS, VARIARUM OBSERVATIONUM LIBER (1685)); NICOLAS TRIGAULT, PURCHAS HIS PILGRIMES (1625). Father Trigault wrote, "neither the [Chinese] king nor his subjects ever think of conquering other nations. They are content with what is theirs and do not covet what belongs to others." *Id.* at 104.

108. *See*, Lan et al., *supra* note 101, at 62 ("[Confucianism] differs substantially from Western philosophical ways of thinking and behaving and is at the philosophical basis for the collectivist and power distance values prevalent in China.").

nent.[109] Neoclassical economists believe that society is best served by each individual and corporation acting in his or her own selfish interests.[110]

Such western neoclassical economic thinking is diametrically opposed to Chinese Confucianism and China's historical social values and morals. Consequently, Chinese regulators are unlikely to build their AML enforcement activities around conservative neoclassical economic theories. The Chinese long have feared the breakdown of general ethical standards and the dangers of "unbridled individualization."[111] Quite simply, the Chinese Confucian Way views ethics and morals as intrinsic to all human behavior, including economic and competitive endeavors.[112]

Many Chinese rightfully fear and believe "that the transition to a market-based economy has been characterized by behavior that is less than ethical and socially irresponsible."[113] Such fears and tensions epitomize a longstanding Chinese fear of "'spiritual pollution,' a term designed to suggest the extent of the damage wrought by decadent influences from the West."[114] In response to such insecurities, fears, and tensions, in 2005, Premier Hu Jintao "launched a nationwide campaign to promote a 'harmonious society,' stressing the traditional Confucian values of moderation, benevolence, and balance, in an apparent effort to counter the sharpening social tensions caused by the economic reforms."[115] In light of such ongoing developments, it seems safe to assume and predict that China is unlikely to renounce its historic Confucian values and ideals in favor of conservative neoclassical economic theories in interpreting and enforcing its AML.

2. *Virtue, Morality, and Law in Chinese Culture*

Since the firm and deep establishment of Confucianism more than 2,000 years ago, the Chinese have strongly believed in the importance of morality and virtue in all walks of life, including the political and social. China long has been "under the sway of the great Confucian myth of the state, government by virtue."[116] Since a Confucian leader rules by

109. *See* Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) ("[A]ntitrust has no moral content . . . ."); *see also* Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 989 (2008).

110. *See* Horton, *Coming Extinction*, *supra* note 9, at 506 ("utility-maximizing consumers interacting amorally with profit-maximizing businesses will lead to the promised land of allocative efficiency."). Interestingly, Adam Smith did not share the neoclassical economists' views that competition should be unfettered and follow the maxims of Social Darwinism. Smith believed that "people are naturally cooperative and sympathetic, and that their self-interest naturally includes concern for others and their opinions." ROBERT C. SOLOMAN, ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS 86 (R. Edward Freeman ed., 1992). For Smith, "self-interest must always be kept in balance with benevolence and other moral sentiments." *Id.* at 87.

111. *See, e.g.*, SPENCE, *supra* note 29, at 17 (describing how Chinese scholars during the Ming Dynasty "concluded that the corruption sprang from a breakdown of the general ethical standards . . . and from the growth of an unbridled individualism.").

112. *See, e.g.*, Romar, *supra* note 91, at 668 ("As a virtue ethic, the Confucian Way governs all aspects of human behavior and ethics cannot be separated from any individual activity.").

113. Shafer et al., *supra* note 39, at 268.

114. SPENCE, *supra* note 29, at 699.

115. FAIRBANK & GOLDMAN, *supra* note 19, at 468.

116. *See id.* at 109. The authors add, "The central myth of the Confucian state was that the ruler's exemplary and benevolent conduct manifesting his personal virtue (*de*) drew the people to him and gave him the Mandate." *Id.* at 111.

virtue of moral goodness, he or she must continually seek the moral approval of the Chinese people.[117] Confucius's emphasis on the moral and ethical conduct of the ruler and his government was "different from anything in the West."[118]

Over the course of China's history, the rule of Confucian virtue and ethics has tended to trump the rule of law in Chinese political thought.[119] In the early years of Confucianism, the rule of virtue was opposed by "The School of the Law" philosophy and its followers, the "Legists."[120] The Legists taught that strict laws rather than Confucian virtue should control the people.[121] Intense opposition to the Legist philosophy helped bring the Han dynasty to power "and forever discredited the School of Law."[122]

Under the Confucian rule of virtue, right conduct, not the law, allowed a Chinese ruler to maintain power.[123] The Chinese ruler was accountable "to a supreme moral force that guides the human community."[124] Thus, when China's last great dynasty, the Qing, came to power in the mid-seventeenth century, they recognized the need to "preserve the social and political order of imperial Confucianism," and "integrate [their] rule with Chinese culture in mutual dependence."[125] As described by noted historians Susan Naquin and Evelyn Rawski, "[L]uan was the disorder that could arise within the state, the community, the household or the individual when ethical norms and correct ritual were not followed. The desire to promote order and prevent luan permeated Chinese society from top to bottom."[126]

Following Confucian virtue and moral precepts, the Chinese have written their history for thousands of years with "a moral purpose—to warn contemporaries by holding up the

117. *Id.* at 154 ("Another strength of Confucian government lay in its constantly seeking the moral approval of the people governed."); *id.* at 52 ("Right conduct gave the ruler power.").

118. *Id.* at 52. Many Chinese scholars blamed the collapse of the Ming dynasty in the mid-seventeenth century on "the extreme individualism and belief in innate moral knowledge that had been so popular in the late Ming." SPENCE, *supra* note 29, at 102.

119. *See, e.g.*, Castellucci, *supra* note 22, at 48 (arguing that the "rule of virtue" "is an important concept in the Confucian tradition of the art of government, as opposed to ruling by the force of the law"); *id.* at 48, n.59 ("[I]n the general principles contained in the T'ang Imperial Code of Laws of year 624, a fundamental rule of government is that virtue and rites are the basis for the government, law and punishment are its instruments, in a typical rule-by-law conception." (internal quotation marks omitted)).

120. *See* KOTKER & FITZGERALD, *supra* note 20, at 71.

121. *See id.* at 71–72.

122. *See id.* at 72. Although the teaching of the Legist School was eventually repudiated, "[l]egist thought remained an influence in Chinese society. It made the law a hated word, and as a result, China developed no civil law. Law was confined to the criminal branch, where it retained much of the severity and cruelty of Legist practice .... It can be said that while later China adopted Confucianism as the ethical and moral basis of society, it retained some Legist concepts in the actual practice of government." *Id.*

123. *See id.* at 52. Confucius is quoted as saying, "[w]hen a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed." CONFUCIUS, ANALECTS, *supra* note 95, at 13.6. More recently, in 2002, in a Resolution adopted in the Sixteenth National Congress of the CCP, the Constitution of the CCP was amended to include a reference to "combining the rule of law with the rule of virtue." *See* Castelluci, *supra* note 22, at 47.

124. FAIRBANK & GOLDMAN, *supra* note 19, at 40. "Unlike a Western ruler's accession . . . the Chinese theory of Heaven's mandate set up moral criteria for holding power." *Id.*

125. *Id.* at 154.

126. *Id.* (quoting SUSAN NAQUIN & EVELYN RAWSKI, CHINESE SOCIETY IN THE EIGHTEENTH CENTURY 92 (1987)); *see also* KOTKER & FITZGERALD, *supra* note 20, at 78 ("The reward of moral virtue was prosperity; the penalty for vice was disaster.").

sad example of past follies and vices and to encourage them with examples of virtue and wisdom."[127] Even today, "legitimacy in China is still tied to the idea that the government should be the defender of a moral order."[128]

China's modern legal system today is still "a work in progress."[129] Over the past thirty-five years, "China has engaged in what is perhaps the most rapid development of any legal system in the history of the world."[130] China amended its Constitution in 1993 as part of its economic reform process and declared, "[t]he State practices a socialist market economy."[131] To help expedite its development as a global market player, "China has been making efforts to build itself into a country under laws that fit into the global market."[132]

In creating its modern legal system, China and its government understand that they must not lose sight of China's long history and culture. Within China today, therefore, "[i]ncreased commitment to the regularization that law brings exists side by side with a system that remains susceptible to popular demands and appeals to popular morality and local custom."[133] In other words, Confucian morals and ethics continue to be as valid and important as ever to China's rulers and their legal and regulatory systems.

The Chinese long have believed that honoring and adhering to Confucian ethics and morals will lead to a better and more harmonious society. Chinese core Confucian values, such as fairness and justice in economic competition, while currently considered mushy

127. KOTKER & FITZGERALD, *supra* note 20, at 12. ("All history depended on the moral qualities of the monarch. . . . [i]f there were calamities, they resulted from the moral defects of the king or emperor. If there was a recovery, it could be traced to the merit of the ruler, inspired by the teaching of the Sages. The result of this moral preoccupation in presenting historical record was to view the processes of human affairs as a series of cycles: rise, splendor, decline, and fall.") *Id.* at 14.

128. Pye, *The State and the Individual*, *supra* note 43, at 461. "[I]f there is a decline in moral standards, the state is directly at fault." *Id.*

129. Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 L. & SOC. INQUIRY 465, 486 (2004).

130. Liebman, *supra* note 15, at 18. Professor Liebman further notes, "[t]he Chinese legal system has been fundamentally transformed since 1978. At the beginning of the reform era there were few laws or trained personnel. Today, China has sophisticated legal institutions, thousands of laws and regulations, and the third largest number of lawyers in the world. Law has begun to regulate both state and individual behavior in ways that were inconceivable in 1978. Commitment to the rule of law has become an important part of state ideology and state legitimacy. Popular understanding of law has expanded dramatically and the legal system has become an important route for addressing grievances and resolving disputes." *Id.*

131. Wang, *supra* note 13, at 133.

132. *Id.* "China's law reform program began in late 1978, at the Third Plenum of the Eleventh Central Committee of the [CCP]. The plenum reflected a tentative policy consensus about the need to reform the state-planned economy and build a legal system that would support economic growth . . . ." Potter, *supra* note 129, at 465. "The study of Chinese law has recovered and flourished since the advent of reform in 1978, aided substantially by rapidly legislating and the increasing use of law and courts as political forums." Jonathon Kinkel & William Hurst, *Review Essay–Access to Justice in Post-Mao China: Assessing the Politics of Criminal and Administrative Law*, 11 J. E. ASIAN STUDS. 467, 468 (2011).

133. Liebman, *supra* note 15, at 32.

and soft by some American antitrust practitioners, scholars, and jurists,[134] are therefore seen as non-negotiable cultural and social bedrocks for China's future.[135]

C. Why China is Likely to be Guided by Its Unique Confucian History and Culture in Interpreting and Enforcing Its AML

Western scholars and critics today are urging China to follow conservative American neoclassical economics in interpreting and enforcing its AML. In the words of former U.S. Antitrust AAG Hewitt Pate, "U.S. and European officials have often approached China like a recruiting prospect—as a new player to be won over to the U.S. or European styles of antitrust."[136] China's long and impressive history and culture, however, ensure that China will do what it has done throughout its long history—chart its own course.[137] The proud Chinese will never allow themselves to become "the tail of someone else's dog."[138]

This does not mean that China will stop studying and adopting western competition regulation theories and ideas. It must be recognized that the western values of individualism and materialism "have recently penetrated Chinese society and are having a great influence on Chinese people's everyday life, in particular, for the young generation."[139] Imported western values vie every day with traditional Chinese Confucian values for the attention of the Chinese populace.[140] It also is true that "the issue of individualism has yet to be resolved in Chinese culture."[141] China's youth continue to demand greater rights and freedoms.[142] Consequently, as the world continues to flatten, there can be little doubt that China will continue to assimilate numerous aspects of Western culture.[143]

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134. *See, e.g.*, Horton, *Coming Extinction*, *supra* note 9, at 505–507; Horton, *Fairness and Antitrust*, *supra* note 9, at 831–37. Again, it is important to recognize that Adam Smith did not view such concepts as mushy. "In 1759, Smith began his book *The Theory of Moral Sentiments* by pointing to the natural human capacity for sympathy as the rule of all morality. . . . From [our] moral sentiments, we derive the general rules of justice and injustice." Larry Arnhart, *Darwinian Conservatism*, *in* Philosophy After Darwin: Classic and Contemporary Readings 349, 350 (Michael Ruse ed., 2008).

135. China's CCP recognizes how critical the ideals of fairness and justice, among others, are to building a successful Socialist economy with Chinese characteristics. In May 2008, China's State Council Information Office publicly released a government white paper describing "the Chinese people's struggles for democracy, freedom, equality, and the building of a country under the rule of law." The State Council Info. Office, China, *China's Efforts and Achievements in Promoting the Rule of Law*, 7 Chinese J. Int'l Law 513, 513 (2008). The government listed "fairness and justice" as critical to China's future, as well as "safeguarding market order and achieving social fairness and justice [in] establish[ing] an initial law regime for the socialist market economy." *Id.* at 514, 517.

136. Pate, *supra* note 18, at 195.

137. *See, e.g.*, Fairbank & Goldman, *supra* note 19, at 164 ("China's modern economy when it did develop would be to a large extent in Chinese hands.").

138. *Id.* at 322.

139. Lan et al., *supra* note 101, at 62.

140. *Id.*

141. Pye, *The State and the Individual*, *supra* note 43, at 466. Professor Pye believed that in China, "[t]he process of working toward a new equilibrium in state-individual relations is certain to be filled with tensions, especially as officials sense the weakening of state authority and the increasing role of the people." *Id.*

142. Lan et al., *supra* note 101, at 62.

143. Some commentators have gone so far as to say, "[i]t seems that while the West is experiencing a transformation in values from a self-oriented focus to a community-oriented focus. . . the reverse appears to be

One must also consider China's reputation for carefully analyzing all sides of an issue and being ready to compromise to promote social harmony.[144] A relevant example of such flexibility "is reflected in the compromises regularly found in the laws and regulations that govern competition and pricing in China."[145] Throughout their history, the Chinese have "preserve[d] the most cherished aspects of their traditional culture by selectively adapting elements of Western learning and technology to China's needs."[146] Therefore, it is likely that China's AML interpretation and enforcement in the coming decades will include a blend of western and Chinese philosophies and approaches.

Whatever ultimate philosophical blend China chooses, China will be guided heavily by its Confucian traditions. Consequently, China's future AML enforcement is likely to be based on social, moral, and political, as well as economic, considerations.[147] These considerations are likely to include a heavy dose of Confucian morals and ethics, as well as broad social concerns.

As a starting point, China's leaders believe that economic and social responsibilities exist together and cannot meaningfully be separated.[148] On September 15, 2006, then Chinese President Hu Jintao described a harmonious Chinese society as one that "gives full play to modern ideas like democracy, rule of law, fairness, justice, [and other social objectives]."[149] Under this Harmonious Society policy, economic growth must be balanced with tackling serious social and economic dislocations, including income inequality between regions and within social groups, and potentially widespread corruption.[150] Rec-

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true for China, where greater emphasis is now being placed on the Western values of individualism and self-awareness." *Id.* at 72–73.

144. *See, e.g.*, FAIRBANK & GOLDMAN, *supra* note 19, at 107 ("Unlike the philosopher's ideal of absolute adherence to principle, the master of a gentry household is advised to think ahead, consider all sides, and be ever ready to compromise."); FITZGERALD & KOTKER, *supra* note 20, at 116 ("There arose that peculiarly Chinese phenomenon, the ability to hold two opposing theologies at the same time on the grounds that both might be partly right. In any case, to the Chinese practice was much more important than theory.").

145. Kennedy, *supra* note 27, at 8.

146. SPENCE, *supra* note 29, at 216. Chinese respect for Western technological power always has blended "with a yearning to retain some essence of Chinese culture." *Id.* at 313. *See also id.* at 224, "[i]n the years after the Sino-Japanese War, a formulation became widespread that gave philosophical reassurance to those worried about the value of 'self-strengthening': 'Chinese learning should remain the essence, but Western learning be used for practical development . . . It affirmed that there was indeed a fundamental structure of Chinese moral and philosophical values that gave continuity and meaning to civilization. Holding onto that belief, China could then afford to adapt quickly and dramatically all sorts of Western practices, and to hire Western advisors."

147. In the words of former Antitrust AAG Pate, "we should not be surprised if *non-antitrust values* find expression in Chinese antitrust outcomes to a greater degree than is the case in the United States or Europe." Pate, *supra* note 18, at 196 (emphasis added). Missing from Pate's characterization of Chinese "non-antitrust values" is that "[t]he history of the continuing debates as to antitrust legislation and regulation reveals that how people think about antitrust issues is generally tied to their underlying assumptions and premises, as well as their implied values." Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195, 201 (2006); *see also* Michael S. Jacobs, *An Essay in the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 265 (1995) ("Choosing between economic theories is as much an act of politics as of science.").

148. *See, e.g.*, See *supra* note 33, at 1.

149. *See Harmonious Society*, THE 17TH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA, (Sept. 30, 2007, 9:14 AM), http://english.peopledaily.com.cn/90002/92169/92211/6274973.html.

150. See, *supra* note 33, at 2. In 2004, when then Assistant AAG Pate visited China, he recalled being told by his hosts, "[y]ou cannot understand China by visiting modern Beijing. You must see more rural areas where many people are poor and need the benefits of economic growth." Pate, *supra* note 18, at 197.

ognizing this, the CCP also issued a list of "Disharmonious elements in China (relevant to corporations)," including the need for moral progress and "unequal income distribution pattern[s]."[151]

In addition, China aspires to create a unique humanistic legal system. "China's legal reforms aim to create a fair system that serves both to further economic development and to address the rights and grievances of those left behind by such development. Ensuring social stability requires that the legal system accomplish both tasks."[152]

The Chinese government, as well as Chinese businesses and citizens, recognize that Corporate Social Responsibility (CSR) will be critical to building a harmonious society and will therefore continue to promote its development in China.[153] The hope is that "Confucian reciprocity can lead to a win-win business relationship and fair competition."[154] Completely antithetical to western ideas of aggressive and even cutthroat competition, fair competition in China assumes a harmonious business relationship between competitors, as well as suppliers, customers, and partners.[155]

China is likely to continue honoring and following its Confucian traditions and morals in building its modern legal system and in interpreting and enforcing its AML. China therefore will continue to encourage its business organizations to adopt and follow Confucian moral and ethical principles. "Business organizations can benefit from Confucian ethics and Confucianism can provide the moral guideposts necessary to overcome opportunism."[156] This Confucian approach will attempt to harmoniously balance the strive for human virtue and profits, respectively.[157]

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151. See, *supra* note 33, at 3. "Selected proposed actions (relevant to corporations)" also were set forth, including "social equity and justice as a basic condition of social harmony." *Id.* In China, the terms equity and justice are an important aspect of socialist ideals. Indeed, Karl Marx's original focus on poverty as the driving force for revolutionary dynamism ultimately shifted "from poverty to an equally objective desire for equality and justice." Kikhu Parekh, *Hannah Arendt's Critique of Marx, in* HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 67, 93 (Melvyn A. Hill, ed., 1979). China's leaders have not forgotten that a primary reason Mao Zedong and the CCP ascended to power was that China's economic growth "had failed to reach hundreds of millions of people." *See* SPENCE, *supra* note 29, at 431.

152. Liebman, *supra* note 15, at 31.

153. For an excellent discussion of the history of CSR in China, see Wang & Juslin, *supra* note 92, at 433–47. The authors argue that "the Western CSR concepts cannot fit the Chinese market well, and CSR concepts have to take Chinese cultural contexts into consideration to be widely disseminated in China and understand better by Chinese corporations and society." *Id.* at 435.

154. *Id.* at 443.

155. *Id.* at 444.

156. Romar, *supra* note 91, at 672. Romar adds: "Confucianism provides the guidance necessary to manage ethically the tension between self-interest and cooperation so necessary to the development and maintenance of successful and moral organizations." *Id.*

157. *See* Chan, *supra* note 95, at 351. It is important to recognize that Confucianism does not attack profit-making unless it is "for selfish purposes and not for the good of the community." *Id.* at 350. Neoclassical American economics conversely follows conservative economist Milton Friedman's view that the only societal responsibility is to maximize efficiencies and to earn profits (subject to compliance with the rule of law). *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–36 (40th anniversary ed. 2002). For several recent Western scholarly opinions differing with Friedman's view, see LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2013); Justin Fox & Jay W. Lorsch, *What Good are Shareholders?* HARV. BUS. REV., July–Aug. 2012.

III. China's Emerging Approach to Interpreting and Enforcing China's AML

Slowly but surely, American antitrust seems to be moving in the direction of more aggressive antitrust enforcement[158] and away from the neoclassical Chicago School economic theories that have dominated American antitrust enforcement since the 1980s.[159] Welcome developments include, among others, influential American antitrust scholars mounting aggressive attacks against exclusionary conduct by dominant firms;[160] questioning the current delineation of relevant markets in antitrust cases;[161] recommending the fostering of a moral component to antitrust crimes;[162] arguing for more aggressive regulation of monopsonies;[163] urging an increase in our shared moral outrage over antitrust violations;[164] applying truly conservative economic models to limit the growth of concentrated private economic power;[165] and proposing dramatically increased fines for cartel violations.[166]

This author previously has proposed applying evolutionary theories to structural and behavioral antitrust issues.[167] This part discusses how China's obeisance to traditional Confucian morals, ethics, and ideals is consistent with the evolutionary theory. Looking at both behavioral (III.A.) and structural competition (III.B.) issues, it is recommended that China continue to follow and apply evolutionary principles in interpreting and enforcing its AML.

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158. *See, e.g.*, Thomas J. Horton, *The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?* 2 J. EUR. COMPETITION L. & PRACT. 158, 158 (2011) (contending that the 2010 revisions to the United States' 1992 Horizontal Merger Guidelines "portend a potentially dramatic and perhaps even counterrevolutionary shift in the enforcement visions and goals of the current [U.S. antitrust] Agencies, and a pronounced convergence towards the EC's Guidelines on the assessment of horizontal mergers.").

159. *See, e.g.*, Horton, *Fairness and Antitrust*, *supra* note 9, at 825 ("Economics rules antitrust today. Jurists and scholars favoring 'consumer welfare' considerations and disfavoring fairness considerations in antitrust are ascendant."); Stucke, *Reconsidering Antitrust's Goals*, *supra* note 68, at 563–66 (discussing ascendance of Chicago School's neoclassical economic theories in American antitrust jurisprudence since the late 1970s); Markham, *supra* note 68, at 281 ("Post-Chicago antitrust theory departs from the Chicago School views mostly around the margins."); Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 385 (2009) ("[M]any commentators urge we are all Chicago School now and that the Chicago School has absorbed most of the competing approaches.").

160. *See, e.g.*, Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L. J. 527 (2013); C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013).

161. *See, e.g.*, Louis Kaplow, *Why (Ever) Define Markets?* 124 HARV. L. REV. 437 (2010).

162. *See, e.g.*, Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443 (2006) [hereinafter Stucke, *Morality and Antitrust*].

163. *See, e.g.*, Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L. J. 1509 (2013).

164. *See, e.g.*, D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Antitrust*, 78 ANTITRUST L. J. 201, 216–19 (2012).

165. *See, e.g.*, James W. Brock, *Economic Power, Henry Simons and a Lost Antitrust Vision of Economic Conservatism*, 58 S.D. L. REV. 443 (2013).

166. *See, e.g.*, John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy*, 34 CARDOZO L. REV. 427 (2012).

167. *See* Horton, *Fairness and Antitrust*, *supra* note 9, at 823; Horton, *Antitrust Double Helix*, *supra* note 9, at 615; Horton, *Coming Extinction*, *supra* note 9, at 469.

A. China's Emerging Evolutionary Approach to Behavioral Competition Issues

1. *Confucianism and Fair Market Competition*

Although Confucianism "has had to weather [an] onslaught of criticisms," many Chinese believe that Confucianism has played a key role in helping China achieve its global economic successes.[168] Today, China and the CCP believe that "fair market competition" is essential in "protecting the consumer and public interests, [and] promoting the healthy development of the socialist market economy."[169] The CCP consistently has emphasized "fairness and justice" as keys to a successful socialist society.[170] Consequently, "[a] major concern for Chinese competition policymakers has been the potential for 'excessive' or 'malignant' competition."[171] Confucian morality traditionally has decried selfishness and greed "as an antisocial evil."[172] "Unbridled individualism" and a "breakdown of the general ethical standards" have been viewed as a recipe for corruption and chaos.[173] Many Chinese intellectuals long have been "appalled by the social evils of unbridled capitalism and extreme individualism in the West."[174] Such fears and concerns have catalyzed calls for "policies that ensure all market participants have a level competitive field."[175]

Both Articles 1 and 5 of the 2008 AML specifically highlight and emphasize the need for fair competition.[176] Such pronouncements are consistent with "[t]he Confucian ap-

168. *See, e.g.*, Chan, *supra* note 95, at 347.

169. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz 68, ch. II, art. 1 (China).

170. *See* The State Council Info. Office, *supra* note 135, at 2.

171. Horton & Huang, *supra* note 1, at 10. *See also* Bruce M. Owen, Su Wen & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 Antitrust L. J. 231, 247 (2008) (discussing the widespread fear of excessive competition in China).

172. Fairbank & Goldman, *supra* note 19, at 258–59. The authors explain, "[w]estern political thought had built up the concept of interests–the personal desires and goals of individuals and groups in their inevitable competition with one another. . . . Not so in China. Interests were by definition selfish, and Confucian morality decried selfishness as an antisocial evil." *Id.* One of China's greatest novels, *Golden Lotus*, which was published anonymously in the early 1600s, can be read "as a moral fable of the way greed and selfishness destroy those with the richest opportunities for happiness . . . ." Spence, *supra* note 29, at 10.

173. *See, e.g.*, Spence, *supra* note 29, at 17.

174. Fung, *State Building*, *supra* note 35, at 320; *see also* Chan, *supra* note 95, at 350 (arguing that "[t]he dangers of extreme capitalism riding roughshod over ethics are real."); Thomas B. Edsall, *Our Broken Social Contract*, N.Y. Times (June 19, 2013, 10:05 PM), http://opinionator.blogs.nytimes.com/2013/06/19/our-broken-social-contract/?_r=0 (discussing the view that "[c]orporate America has abandoned its commitment to the commonwealth over the past three decades. It no longer honors norms of fairness and equality . . . it is in the economic sphere that American integrity has been eroded and its ideals corrupted.").

175. Hongbin Cai & Qiao Liu, *Competition and Corporate Tax Avoidance: Evidence from Chinese Industrial Firms*, 119 Econ. J. 764, 794 (2009).

176. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz 68, ch. II, art. 1, 5 (China). (Anti-Monopoly Law of the People's Republic of China Article 5 states, "Undertakings may, through fair competition and voluntary alliance, implement concentration, expand business scale and improve their market competitiveness according to law.").

proach, [which] suggests that one should adopt a proper focus towards the striving for human virtue and profits, respectively."[177]

On December 1, 1993, approximately fifteen years before the implementation of its AML, China passed its Anti-Unfair Competition Law (AUCL).[178] Enacted to help the transition from a state-planned to a socialist market economy, the AUCL "was the first landmark legislation regulating competition in China."[179] "The stated purpose of the AUCL is to encourage and protect fair competition, prevent unfair competition practices, and protect the legal rights and interests of business operators and consumers."[180] The express and unequivocal language in both the AUCL and the AML shows how serious China is about ensuring "fair competition." A review of China's recent China Competition Bulletins (CCB), published by China's Competition Research Center, further drives this home.[181]

China's objectives of competitive fairness on a level, competitive playing field are fully consistent with evolutionary norms of fairness. Today, "evolutionary biologists, behavioral economists, and legal and business scholars are coming to appreciate how fundamental and critical humans' innate sense of fairness has been to our long-term evolutionary and economic success."[182] We have evolved to care deeply about the fairness of exchange

177. Chan, *supra* note 95, at 351.

178. HARRIS ET AL., *supra* note 1, at 331.

179. *Id.*

180. *Id.* Article 1 of the AUCL states, "[t]his Law is formulated with a view to safeguarding the healthy development of [the] socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers." Zhōnghuá rénmín gònghéguó fǎn bú zhèngdàng jìngzhēng fǎ (中华人民共和国反不正当竞争法) [Anti Unfair Competition Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Sep. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 92, art. 1 (China). Article 2 (AUCL) adds in part, "[a] business operator shall, in his market transactions, follow the principles of voluntariness, equality, fairness, honesty, and credibility and observe the generally recognized business ethics." *Id.* art. 2.

181. *See, e.g.*, CHINA COMPETITION BULL. 1 (25th ed. 2013) ("The principles of openness and transparency, fair competition, impartiality, and good faith are to be observed in government procurement. China's government procurement system provides general rules on competition, transparency, and fairness."); CHINA COMPETITION BULL. 2 (17th ed. 2012) (discussing how the new Rules on Retailing Fees were promulgated "for the purpose of maintaining market order and fair trading and promoting the healthy development of the retail industry"); CHINA COMPETITION BULL. 1 (12th ed. 2011) ("The draft Internet Information Service Rules contain 22 articles and prohibit Internet information services from engaging in conduct that may damage the legal rights of their competitors and consumers."); CHINA COMPETITION BULL. 1 (8th ed. 2011) (The Service Codes for E-Commerce Third Party Transaction Platforms forbid "imped[ing] the legitimate interests of other business operators and consumers."); CHINA COMPETITION BULL. 5 (7th ed. 2011) (discussing the State-Owned Enterprises Research Project Conference and Academic Seminar, and observing that Chinese Competition Professor Xiaoye Wang "noted that the AML should be equally applied to SOEs, private enterprises, and multinational companies to promote fair competition and improve the market economy system in China"); *see also* CHINA COMPETITION BULL. 4–5 (20th ed. 2012) (discussing MOFCOM's conditional approval of Google's acquisition of Motorola Mobility with the requirement that "Google must honour Motorola Mobility's existing commitment to license its patents on fair, reasonable, and non-discriminatory terms").

182. Horton, *Fairness and Antitrust*, *supra* note 9, at 839–40; *see also* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 325 (1998) ("we are learning the fundamental principle that ethics is everything"); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND CREATION OF PROSPERITY 152 (1995) ("We often take a minimal level of trust and honesty for granted and forget that they pervade economic life and are crucial to its smooth functioning."); MARK BEKOFF & JESSICA PIERCE, WILD JUSTICE: THE MORAL

relationships,[183] and a moral sense of fairness is hard-wired into our brains.[184] "Multidisciplinary studies confirm 'that most of us do have a bias toward cooperation and a readiness to reciprocate—a sense of fairness.'"[185]

China's focus on fair competition dramatically distinguishes it from the United States. In the United States today, "[f]or many American jurists and scholars, the notion that antitrust and competition law should incorporate moral norms of fairness is anathema."[186] Many American competition lawyers and economists today view fairness as a "non-antitrust value."[187] The Chinese disagree.[188] Ironically, while most commentators see China as racing to struggle and catch the United States in competition law, China has the potential to set a progressive leadership tone for antitrust and fairness in the twenty-first century.

What are some of the practical implications of China following evolutionary norms of fairness in interpreting and enforcing its AML in the coming years? The first is that China is likely to be much more aggressive in addressing exclusionary competitive behavior than the United States has been over the last forty years.[189]

In the United States, "[a]ntitrust commentators associated with the Chicago School have long expressed deep skepticism about exclusion as an antitrust theory, particularly as applied to dominant firm conduct."[190] In modern American jurisprudence, "[i]t is axiomatic that predatory pricing cases are highly disfavored in antitrust . . . [and] it has become virtually impossible for a plaintiff to win a predatory pricing case."[191]

Following Confucian ideals and evolutionary theory, China is likely to choose a different path from the United States in regulating exclusionary competitive behavior. Both China's AUCL and AML take dim views of predatory pricing. As an example, Article 11 of China's AUCL prohibits businesses from selling goods below cost for the purpose of forcing out competitors, except in severely limited circumstances.[192] Article 11 applies

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LIVES OF ANIMALS xii (2009) ("Cooperation, fairness, and justice have to be factored into the evolutionary equation in order to understand the evolution of social behavior in diverse species.").

183. *See, e.g.*, MICHAEL SHERMER, THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS 176 (2008); BEKOFF & PIERCE, *supra* note 182, at 134 ("Our informed guess would be that justice and a sense of fairness have evolved out of the more basic repertoire of cooperative and altruistic behavior.").

184. *See, e.g.*, SHERMER, *supra* note 183, at 113 ("The moral sense of fairness is hardwired into our brains and is an emotion shared by all people and primates tested for it.").

185. Horton, *Fairness and Antitrust*, *supra* note 9, at 841 (quoting PETER CORNING, THE FAIR SOCIETY AND THE PURSUIT OF SOCIAL JUSTICE 196 (2011)).

186. Horton, *Fairness and Antitrust*, *supra* note 9, at 823–24.

187. *See* Pate, *supra* note 18, at 196.

188. Seventh Circuit Judge and former academic Frank Easterbrook has asked, "[w]ho says that competition is supposed to be fair?" Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part). The simple answer to Judge Easterbrook's question may be more than a billion Chinese.

189. Exclusion "encompass[es] both the complete foreclosure of rivals or potential entrants and conduct that disadvantages rivals without necessarily inducing them to exit." Baker, *supra* note 160, at 527 n.1.

190. *Id.* at 528. Professor Baker adds, "[e]xclusionary conduct is commonly relegated to the periphery in contemporary antitrust discourse, while price fixing, market division, and other forms of collusion are placed at the core of competition policy." *Id.* at 527.

191. Horton, *Fairness and Antitrust*, *supra* note 9, at 853.

192. Zhōnghuá rénmín gònghéguó fǎn bú zhèngdàng jìngzhēng fǎ (中华人民共和国反不正当竞争法) [Anti Unfair Competition Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l Peo-

even where "the undertaking in question does not have a dominant position."[193] Nor does Article 11 require "the existence of negative effects on competition."[194]

Similarly, China's National Development and Reform Commission (NDRC) Anti-Price Monopoly Laws, promulgated in accordance with China's AML, have the goals of protecting fair market competition, and safeguarding the interests of the consumers and the public.[195] The Rules forbid "price monopoly conduct," including any use of pricing means by an undertaking with a dominant market position to eliminate or restrict market competition.[196]

Importantly, neither the AUCL nor the AML and its accompanying rules appear to require a showing of anticompetitive intent in carrying out exclusionary pricing or other conduct.[197] Nevertheless, proof of anticompetitive intent is likely to carry great weight with China's AML regulators and courts, as such intent is inconsistent with the overall tenor of the AML and China's Confucian traditions. Such a policy accords with evolutionary theory and economics, which urges that antitrust regulators should pay increased attention to both evolutionary norms of fairness and anticompetitive intent in exclusionary cases.[198]

Western critics undoubtedly will argue that China is jumping onto a slippery slope in seeking to evaluate such subjective factors as competitive fairness and anticompetitive intent in interpreting and enforcing its AML.[199] They will characterize such notions as hopelessly subjective and lacking any meaningful economic guidance.[200]

The Chinese, as they have done to date, should resist such criticisms. Through their long history, which has included numerous invasions and intrusions by outsiders, China has learned that human predatory behavior can be shockingly and unconscionably real and dangerous.[201] In the words of Harvard psychology Professor Steven Pinker, "[h]uman nature accommodates motives that impel us to violence, like predation, dominance, and

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ple's Cong., Sep. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 92, art. 11 (China).

193. HARRIS ET AL., *supra* note 1, at 339.

194. *Id.*

195. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 1 (China).

196. *Id.* art 3. *See also id.* art. 6 ("Undertakings with dominant market positions shall not abuse their dominant provisions to eliminate or restrict competition."); *id.* art. 17(2) ("Undertakings [with] dominant market positions are prohibited from. . . [s]elling products at prices below cost without any justification)."

197. *See, e.g.*, HARRIS ET AL., *supra* note 1, at 339 ("Article 11 [of the AUCL] does not require the existence of negative effects on competition. In addition, the 'purpose of forcing out competitors' may be implied from the conduct of below-cost selling.").

198. *See* Horton, *Fairness and Antitrust*, *supra* note 9, at 845–51; Horton, *Antitrust Double Helix*, *supra* note 9, at 654–55; Maurice E. Stucke, *Is Intent Relevant?*, 8 J. L. ECON. & POL'Y 801 (2012) [hereinafter Stucke, *Is Intent Relevant?*].

199. For a detailed discussion of "the case against fairness" in antitrust, see Horton, *Fairness and Antitrust*, *supra* note 9, at 829–35.

200. *See id.* at 831.

201. In Nanjing, for example, during the Japanese invasion in World War II, "there was no transcendental moral code . . . [and] Chinese were killed in every conceivable manner, including being crucified, savaged by dogs, bayoneted to save ammunition or beheaded." BURLEIGH, *supra* note 36, at 19.

vengeance. . . . When an opportunity does arise to eliminate a hated opponent with little danger of reprisal, a Darwinian creature will seize on it."[202]

Unlike America's Chicago School, the Chinese do not accept that a rational competitor will never engage in predatory economic conduct against a rival unless it can receive full recoupment of its costs later on.[203] Evolutionary theory provides support for such a view. Professor Pinker has pointed out how predatory violence in human societies is often irrational.[204]

In his seminal article on social norms and roles,[205] Professor Cass R. Sunstein explained how "[a] good deal of governmental action is self-consciously designed to change norms, meanings, and or roles, and in that way to increase the individual benefits or decrease the individual costs associated with certain acts."[206] Governments and regulators often employ euphemisms, such as "the reframing of a harm in words that somehow make [a harmful act] feel less immoral."[207] Displacement of responsibility, derogating the victim, and moral distancing additionally can be employed to justify harmful acts.[208]

Employing economic terms and phrases like consumer welfare, efficiencies, recoupment, and "protecting competition—not competitors," America's Chicago School has successfully established amoral norms justifying and encouraging dangerous predatory and exclusionary economic conduct.[209] In changing America's moral norms, Chicagoans have

202. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 483, 487 (2011).

203. *E.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (No recovery for predatory pricing under Section 2 of the Sherman Act on primary-line price discrimination under the Robinson-Patman Act without a showing "that the competitor had a reasonable prospect, or under § 2 of the Sherman Act, a dangerous probability of recouping its investment in below-cost prices.").

204. *See* PINKER, *supra* note 202, at 511. Professor Pinker explains, "[t]hough predatory violence is purely practical, the human mind does not stick to abstract reasoning for long. . . . As soon as the objects being preyed upon take protective measures in response, emotions are likely to run high. . . . In these cases the predator's state of mind may shift from dispassionate means-ends analysis to disgust, hatred, and anger. As we have seen, perpetrators commonly analogize their victims to vermin and treat them with moralized disgust. Or they may see them as existential threats and treat them with hatred, the emotion that, as Aristotle noted, consists of a desire not to punish an adversary but to end its existence." *Id.* Professor Pinker continues, "[t]here is a second way self-serving biases can fan a small flame of predatory violence into an inferno. People exaggerate not just their moral rectitude but their power and prospects, a sub-type of self-serving bias called positive illusions." *Id.*

205. Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903 (1996).

206. *Id.* Professor Sunstein adds, "[t]hus government might try to inculcate or to remove shame, fear of which can be a powerful deterrent to behavior. The inculcation of shame operates as a kind of tax; the removal of shame might be seen as the elimination of a tax or even as a kind of subsidy." *Id.*

207. PINKER, *supra* note 202, at 565 – 66. *See also* George Orwell, *Politics and the English Language*, HORIZON, Apr. 1946, at 252 (describing how governments can cloak atrocities in bureaucratese).

208. *See* PINKER, *supra* note 202, at 566–68.

209. *Antitrust Double Helix*, *supra* note 9, at 622, 669; *see Coming Extinction*, *supra* note 9, at 517–21; John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2469 (2013); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2402 – 2403 (2013).

allowed dominant firms and monopolies to behave unfairly while taking "detached, amoral stance[s] towards [their] harmful act[s]."[210]

To their credit, the Chinese are choosing an evolutionary path, rather than a neoclassical economic one, in seeking to instill and promote evolutionary norms of fairness in economic competition. The Chinese are to be applauded for following their noble Confucian traditions in seeking to discourage anticompetitive exclusionary and unfair conduct by competitors.

2. *Confucian Ethics and Morals and Corporate Social Responsibility*

Recent antitrust scholarship has addressed the evolutionary importance of morals and ethics and their importance to future antitrust enforcement.[211] Morality and ethics are crucial to our ability to build and maintain exchange markets.[212] Recent anthropological research shows that "moral norms across the world cluster around a small number of themes."[213] In the simple words of noted evolutionary biologist Edward O. Wilson, "we are learning the fundamental principle that ethics is everything."[214]

While Chicago School adherents in the United States believe that antitrust is amoral and should include no moral components,[215] recent scholarship has urged that it is time to reincorporate morality into America's antitrust laws.[216] Fortunately, societal concern for ethical behavior appears to be on the rise today.[217] "Over the past fifteen to twenty years, there has been increased academic and practitioner interest in and concern with ethical

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210. PINKER, *supra* note 202, at 495. "Even in matters when no reasonable third party can doubt who's right and who's wrong, we have to be prepared, when putting on psychological spectacles, to see that evildoers always think they are acting morally." *Id.* at 494.

211. *See, e.g.*, *Coming Extinction*, *supra* note 9, at 508–14; *Morality and Antitrust*, *supra* note 162, at 505–23.

212. *See Coming Extinction*, *supra* note 9, at 510; RICHARD LEAKEY & ROGER LEWIN, ORIGINS RECONSIDERED: IN SEARCH OF WHAT MAKES US HUMAN 350 (1992) (discussing how the social skill of cooperation evolved into "a set of rule of conduct, or morals, an understanding of right and wrong in a complex social system"); Joseph Heinrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, SCI., Mar. 19, 2010, at 1484 (discussing the importance of ethical norms in building societies).

213. PINKER, *supra* note 202, at 624.

214. WILSON, *supra* note 182, at 325. Wilson adds, "[h]uman social existence, unlike animal sociality, is based on the genetic propensity to form long-term contracts that evolve by culture into moral precepts and law. . . . We . . . have discovered which covenants are necessary for survival, and we have accepted the necessity of securing them by sacred oath." *Id.* at 325 – 26.

215. *See generally* PINKER, *supra* note 202. Professor Pinker observes, "[t]he unease with which we read these rationalization [by wrongdoers] tells us something about the very act of donning psychological spectacles. . . . [I]n the attempt to understand harm-doing, the viewpoint of the scientist or scholar overlaps with the viewpoint of the perpetrator. Both take a detached, amoral stance toward the harmful act. . . . The viewpoint of the moralist, [however], is the viewpoint of the victim." *Id.* at 495.

216. *See, e.g.*, *Coming Extinction*, *supra* note 9, at 514 ("We need explicit ethical codes to rein in the inexorable temptations in business to win by any means possible. . . . Only through such a morals-based evolutionary biology and ethics approach can we hope to emphasize that we will not tolerate anticompetitive actions that trammel the competitive process."); Sokol, *supra* note 164, at 216 – 219 ("Moral outrage and shame have a place in cartel enforcement as it creates its own form of deterrence."); *Morality and Antitrust*, *supra* note 162, at 546–47 ("Although antitrust scholars, policymakers, enforcers, and courts have divorced morality from antitrust, . . . it is time to bring morality into the debate.").

217. *See, e.g.*, Ge & Thomas, *supra* note 30, at 190 ("Societal concern for ethical behavior is also on the rise.").

issues in business."[218] One advantage of such societal concerns is that "[a]lthough developing a moral norm and educating society about it may have high fixed costs, once that moral norm is internalized, self-policing reduces enforcement costs."[219]

The Chinese do not view competition or their AML as amoral. "Mandarins were steeped in Confucian ethics and a code of moral values intended to maintain order and hierarchy in society by eliminating the opportunity for people to disturb the *tao* (interaction of natural forces)."[220] Indeed, many throughout China and Asia are proclaiming the importance of Asian values while seeking to resist "the moral failings of Western societies."[221] While American antitrust regulators and courts simply have accepted and embraced the amorality of our antitrust laws, the Chinese have sought to "sharpen the rigor of the intellectual tools needed to analyze the efficacy and morality of political actions,"[222] including the interpretation and enforcement of their AML laws.

While neoclassical economists may cringe at the idea of a fair and orderly marketplace, the Chinese embrace such a concept as part of their Confucian moral traditions. Therefore, we should not be surprised to see repeated references in China's AML and competition regulations to a "socialist market economy" that includes a "united, open, and orderly market system."[223] The AML also requires state-owned enterprises to act "in good faith, with strict self-discipline, [and] subject themselves to the supervision from the to public supervision."[224]

Rather than viewing business and commercial morality and ethics as an impediment to creating consumer welfare, the Chinese believe that CSR can enhance the global competitiveness of China's businesses.[225] Today, "CSR is becoming a tool for improving the com-

218. Singh et al., *supra* note 49, at 86. The authors add, "[t]he number of journals and conferences related to ethics has also increased significantly, and ethics tracks are now common at most business conferences. Business ethics is a topic of concern to the general public as well. In the past few years, . . . the American public has become interested in and concerned with the condition of corporate ethics. This increased interest in ethics is a worldwide phenomenon." *Id.*

219. *Morality and Antitrust*, *supra* note 162, at 514. *See also Fairness and Antitrust*, *supra* note 9, at 845 ("Our potential for intense shared moral outrage can encourage better behavior and fairness in social dealings.").

220. MENZIES, *supra* note 87, at 50.

221. FAIRBANK & GOLDMAN, *supra* note 19, at 431. *See also Civility*, *supra* note 55, at 763 (Voices in China "now are proclaiming that 'Asian values' are different from Western ones, and that economic growth can occur without the individualism associated with pluralistic democracy.").

222. SPENCE, *supra* note 29, at xx.

223. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和國主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 4 (China).; *see also Id.* art. 11 ("Industry association shall improve self-discipline in the relevant industries, lead the undertakings in the relevant industries to compete in accordance with laws and maintain the orders of market competition").

224. Anti-Monopoly Law of the People's Republic of China, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 7; *see also* Pearson, *supra* note 62, at 312 (discussing China's regulatory "preference for 'orderly' competition"); *Id.* at 314 (discussing how the Chinese "continued to regard unfettered competition as harmful and decided accordingly that competition in strategic, state-owned industries should be 'orderly'"). Professor Pearson additionally observes, "[a] major CCP statement on the economy issued in 2003 reiterated that the state should 'restrain disorderly competition,' a goal voiced repeatedly in statements by regulators in both network industries and financial services." *Id.*

225. *E.g.*, Wang & Juslin, *supra* note 92, at 437 ("The Chinese government, enterprises, and society have realized that developing CSR is an important contribution to building a harmonious society, and have taken a series of positive actions to promote its development in China").

petitiveness of the Chinese enterprises in the global market."[226] Consistent with the morality requirements of China's AML, China's 2006 PRC Company Law similarly requires that "a company shall accept social responsibility, and not only comply with the laws and administrative regulations, but also observe social morality and business ethics."[227]

The western proponents of neoclassical economics may belittle China's efforts to impose morality and ethics upon its businesses. But in following evolutionary theory in drafting its AML's requirements of fairness and ethical behavior, China may be onto something. Rather than turning a blind eye to predatory and exclusionary conduct by dominant firms, as the United States has done, it seems that China recognizes that monopolies and dominant firms can and must be controlled. In the words of Steven Pinker,

> Dominance is an adaptation to anarchy, and it serves no purpose in a society that has undergone a civilizing process or in an international system regulated by agreements and norms. Anything that deflates the concept of dominance is likely to drive down the frequency of fights between individuals and wars between groups. That doesn't mean that the emotions behind dominance will ever go away—they are very much a part of our biology—but they can be marginalized.[228]

China and its AML deserve substantial praise for seeking to marginalize economic dominance and unfair exclusionary and predatory behavior by adhering to Confucian ethical and moral norms.

B. China's Emerging Evolutionary Approach to Structural Competition Issues

China's recent 2011 census estimated that China has approximately 1.34 billion people, or nearly 18 percent of the world's population.[229] This population is dispersed throughout a vast nation that is still far from being a fully integrated or homogeneous country.[230] While many westerners may view China as fairly homogeneous, China actually is a nation of tremendous economic diversity and variation. "China's vast expanses [have] allowed for endless variations in such areas as pace of economic change, types of lineage organization, efficiency of transportation, religious practices, sophistication of commerce, and patterns of land use and landholding."[231]

Economic scholars have identified nine historic economic regions within China, each embracing parts of several provinces, and having a core "defined by heightened economic activity in major cities, high population density, and comparatively sophisticated transpor-

226. *Id.*

227. *Id.* at 438. *Cf.* Eabrasu, *supra* note 30, page 437 (arguing that corporations should "differentiate themselves from their competitors on the complex map of morality by building their own moral identity").

228. Pinker, *supra* note 202, at 528.

229. *See* National Bureau of Statistics of China, Communiqué of the National Bureau of Statistics of People's Republic of China on Major Figures of the 2010 Population Census[1] (No. 1) (2011); National Bureau of Statistics of China, Communiqué of the National Bureau of Statistics of People's Republic of China on Major Figures of the 2010 Population Census[1] (No. 2) (2011).

230. *See, e.g.*, Spence, *supra* note 29, at 90.

231. *Id.*

tation networks."[232] "[E]ach core was surrounded by a periphery of less populated and developed areas."[233] Historic tensions between regional and central authorities and of crosscutting bureaucratic lines has added to such regional economic diversity.[234]

China's dazzling economic diversity is further fueled by the entrepreneurial spirit of its citizens. In China's bustling cities, vast numbers of small businesses exist alongside the towers of industrial and corporate giants. The excitement of a thriving and diverse economy fills the air. In 2012, China overtook the United States to become the biggest trading nation in the world.[235]

Unlike the United States, where growing economic consolidation seems to be a general rule,[236] Chinese economic reforms since the late 1970s have actually strengthened a trend in China towards economic decentralization.[237] "Official statistics indicate that market concentration ratios in China have been unusually low when compared to both developed and developing countries."[238]

A number of scholars credit China's industrial decentralization "with creating the conditions for China's economic success since the late 1970s."[239] Yet, many western critics heavily criticize China's economic decentralization and low market concentration ratios. They decry Chinese industry as economically inefficient,[240] lacking in scale economies,[241]

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232. *Id.* at 91.

233. *Id.*

234. *Id.* at 524 (Professor Spence adds that when the CCP took power, such tensions "which had in various ways plagued China since the late Ming dynasty, were not going to be eradicated in any simple way").

235. Haley & Haley, *supra* note 73 (The authors additionally observe, "[s]ince 2000, the value of Chinese exports [have] more than quadrupled. In 2009, China surpassed Germany to become the world's largest exporter. In 2010, it overtook Japan to become the second-largest manufacturer, and its foreign-exchange reserves became the largest in the world.").

236. *See generally* WALTER A. ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY (2d ed. 2004); BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); TED NACE, GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY 100 (2005) (discussing the "rapidly accelerating trend to concentration" as a result of a "lenient policy on mergers"); KENNETH M. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS (2003).

237. *See, e.g.*, Zheng, *supra* note 18, at 656; Yingyi Qian & Chenggang Xu, *Why China's Economic Reforms Differ: The M-Form Hierarchy and Entry/Expansion of the Non-State Sector*, 1 ECON. TRANSITION 135, 145 – 47 (1993); YINGYI QIAN, TETSUYA KATAOKA & BARRY R. WEINGAST, CHINA'S TRANSITION TO MARKETS: MARKET-PRESERVING FEDERALISM, CHINESE STYLE 10–21 (1995).

238. Zheng, *supra* note 18, at 659, 710 (Professor Zheng adds, "[b]etween the mid-1980s and the mid-1990s, the average market concentration ratio for the largest one hundred firms in various sectors hovered between ten and sixteen percent. In the mid-1990s, in eighteen out of thirty-nine major sectors, the largest eight firms in each sector accounted for less than ten percent of the market share . . . [M]ost of China's industries, with the exception of the monopoly industries, are characterized by small-scale firms and low market concentration ratios"); *see also* Kennedy, *supra* note 27, at 26–27 (discussing the low concentration "by international standards" for "many . . . industries in China"); MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY 258 n.148 (2006) (citing QI LUDONG, ECONOMIC STUDIES ON MONOPOLIES IN CONTEMPORARY CHINA 146–48 (1999)).

239. Zheng, *supra* note 18, at 657; *see also* Qian & Xu, *supra* note 237, at 152–56 (arguing that China's decentralized industrial structure allowed flexibility and opportunities for regional economic experiments, which helped spur the emergence of China's thriving non-state economic section); Jean C. Oi, *Fiscal Reform and the Economic Foundation of Local State Cooperation in China*, 45 WORLD POL. 99, 102 (1992) (discussing how China's economic reforms encouraged local development).

240. *See, e.g.*, Haley & Haley, *supra* note 73 ("The state has willingly paid the price of economic inefficiency to accomplish political, social, economic, and diplomatic goals"); HOWELL ET AL., *supra* note 1, at 90 ("Chi-

and plagued by excess capacity.[242] One scholar even has argued that "a compelling explanation for the widespread failure of Chinese price cartels is the extremely low concentration of production in Chinese industries."[243]

Industrial decentralization and deconcentration in China is not an accident. It is undoubtedly true that China is still plagued by concentrated SOEs,[244] which it must continue to reform and deconcentrate. On the other hand, China continues to show a keen interest in protecting the long-term health and economic opportunities of smaller competitors.[245] As an example, AML Article 15(3) expressly exempts from its coverage monopolistic agreements if their aim is "improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises."[246] Other sections of China's AML show a similar solicitude for the health and well being of smaller Chinese business enterprises.[247] While the United States during the 1980s was zealously implementing Chicago School economic theories allowing massive economic consolidations,[248] the Chi-

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nese policymakers have expressed concern that in many domestic industrial sectors, Chinese enterprises are too small to achieve the economies of scale necessary to complete internationally on an equal footing with large foreign enterprises").

241. *See, e.g.*, Haley & Haley, *supra* note 73 ("Production came mostly from small companies that possessed no scale economies"); ZHENG, *supra* note 18, at 659 ("The duplication of industries at the provincial level and the resulting low economies of scale led to generally low market concentration ratios in China").

242. *See, e.g.*, Haley & Haley, *supra* note 73.

243. Kennedy, *supra* note 27, at 26.

244. A discussion of China's SOEs and China's ongoing efforts to reform and rein them in is beyond the scope of this article.

245. *See, e.g.*, Horton & Huang, *supra* note 6, at 101.

246. *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 15(3) (China).

247. *See, e.g.*, *id.* arts. 1 (protecting fair market competition), 4 (protecting open and competitive markets), 5 (protecting fair competition), 6 (forbidding dominant undertakings from abusing their market positions "to eliminate or restrict competition"), 11 (allowing trade associations to "maintain the order of market competition"), and 17 (forbidding numerous specified abuses of dominant market positions). China is not alone in recognizing the importance of protecting competitive opportunities. South Africa's Competition Act of 1998, for example, states that one of the purposes of its competition law is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy." Competition Act 89 of 1998 § 2(e) (S. Afr.). Ironically, in its Aid to Small Business Act, the United States Congress stated, "[t]he essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise." 15 U.S.C. § 631 (2010).

248. *See generally* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

nese were aggressively encouraging local government support of grass-roots enterprises[249] and working to develop independent zones of enterprise.[250]

More recently, in 2010, former Premier Jiabao Wen announced that China was going to accelerate the reform of monopoly industries to further encourage and promote fair competition among private- and state-owned enterprises.[251] Indeed, "[p]ressure to increase market competition for China's state-owned enterprises has come from the highest levels of government."[252]

At the same time, however, the Chinese government has repeatedly made it clear that it does not wish to allow excessive, harmful, unfettered, or unfair competition.[253] The Chinese government unashamedly and unabashedly has announced its intentions to "develop a united, open, competitive, and orderly market system."[254] A major CCP statement on the economy issued in 2003 reiterated that the state should restrain disorderly competition.[255] As previously discussed, such objectives mesh with traditional Confucian notions of a harmonious and fair society.

Such policies and ideals deeply trouble some conservative competition scholars.[256] They see China as following the "wrong turns by U.S. antitrust policy in the past."[257] Are the Chinese really so misguided in seeking to guard entrepreneurial opportunity and enhance fair competition on a level playing field? Maybe not. At least one study has positively shown "that for non-state-owned Chinese firms, corporate ownership dispersion is

249. *See, e.g.*, FAIRBANK & GOLDMAN, *supra* note 19, at 408. (China's then Premier Deng Xiaoping saw such encouragement of small business enterprises as part of a program of reforms called "Socialism with Chinese characteristics.") A key goal was to adopt Western technologies and economic methods "while still maintaining the traditional Confucian state and values." *Id.* Indeed, simultaneously with such economic reform programs, the CCP issued "a blanket condemnation of what was called 'spiritual pollution; a term designed to suggest the extent of decadent influences from the West." SPENCE, *supra* note 29, at 699.

250. *See* SPENCE, *supra* note 29, at 732. Gavin Menzies notes that "[t]he Chinese were always careful to respect local sensibilities[.]" MENZIES, *supra* note 87, at 133.

251. *See* Kexin Li, *Antitrust Compliance Programs in China: Experiences from Practice* 11 (Am. Antitrust Inst., Working Paper No. 13-5, 2013).

252. Pearson, *supra* note 62, at 314. Professor Pearson adds, "[c]ompetition, officials argue, will help firms to become more efficient and profitable." *Id.* "To enhance competition in the last decade, the Chinese government [also] has spun-off state-owned monopolies from government industries and broken them up." *Id.* at 315.

253. *See, e.g.*, Pearson, *supra* note 62, at 314.

254. *See, e.g.*, *See* Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国主席令) [Anti-Monopoly Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 68, ch. II, art. 4 (China).

255. Pearson, *supra* note 62, at 314 (quoting Xinhua, Speech at the Third Plenum of the 16th Party Congress: Decision on Perfecting the Socialist Market Economic Decision (Oct. 2003)).

256. *See, e.g.*, Liu, *supra* note 76, at 301 ("Lack of strong political commitment to robust competition laws, while clinging to fuzzy notions of fairness, can reduce the predictability of Asian competition law enforcement"); Zheng, *supra* note 18, at 720 ("In sum, despite having a Western-style antitrust law, China has not developed and likely will not develop Western-style antitrust jurisprudence in the near future due to these local conditions."); Howell et al., *supra* note 1, at 95 ("The areas of divergence from U.S. antitrust practice recall an earlier era in the United States, when antitrust was an expression of popular anxieties, political and social values, and a system of economic regulation."). Carl Riskin went so far as to describe China's economic policies as a "crippled hybrid." FAIRBANK & GOLDMAN, *supra* note 19, at 398.

257. Howell et al., *supra* note 1, at 95.

positively associated to CSR."[258] Thus, corporate power dispersion in China may well aid in achieving the Confucian ideal of a harmonious society.

In addition, modern evolutionary theory calls into question the current extreme American "judicial tolerance of monopolies and predatory conduct," which "views monopolies as 'an important element in the free market system,' and believes that monopoly pricing allows dominant firms to engage in risk taking that produces innovation and economic growth."[259] Evolutionary theory counsels that competitive diversity enhances an ecosystem's overall fitness and leads to increased overall adaptability, resilience, and stability.[260] Therefore, evolutionary theory counsels that, "we should protect healthy and stable competition by guarding competitors against [predatory and exclusionary] antitrust violations, and by pursuing merger policies that promote and protect variation and diversity rather than concentration."[261]

In 1945, Judge Learned Hand boldly stated, "[i]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his skill and character, to one in which the greater mass of those engaged must accept the direction of a few."[262] Five years later, the United States Senate observed in passing the 1950 Celler-Kefauver Amendments to the Clayton Act,

> While there exist many differences of opinion on other aspects of the monopoly problem, there is substantial agreement that the level of economic concentration is extremely high . . . The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.[263]

The Chinese appear to be aspiring and attempting to follow more closely the admonitions of Judge Learned Hand and the 1950 United States Senate than the neoclassical economic theories of the Chicago School in their AML's regulation of structural competi-

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258. Wenjing Li & Ran Zhang, *Corporate Social Responsibility, Ownership Structure, and Political Interference: Evidence from China*, 96 J. BUS. ETHICS 631 (2010). The authors point to additional work documenting that Chinese firms "smaller in size, non-state-owned, producing traditional goods, and located in poorer regions are more likely to have managers who opt for a higher CSR rating in China." *Id.* at 633.

259. Horton, *Antitrust Double Helix*, *supra* note 9, at 615–16 (*quoting* Rudolph J.R. Peritz, COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW 239 (1996) (*quoting* Richard A. Posner, ANTITRUST LAW 28 (2d ed. 2001))); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

260. Horton, *Antitrust Double Helix*, *supra* note 9, at 644–45. *See also* SCOTT E. PAGE, DIVERSITY AND COMPLEXITY 8–10 (2011) ("First, diversity often enhances the robustness of complex systems . . . systems that lack diversity can lose functionality. . . . Second, diversity drives innovation and productivity . . . we should not be at all surprised that productivity correlates with diversity"); WILSON, *supra* note 182, at 322 ("The more species that live in an ecosystem, the higher its productivity and the greater its ability to withstand drought and other kinds of environmental stress").

261. Horton, *Antitrust Double Helix*, *supra* note 9, at 646; *see also* HORTON, *Coming Extinction*, *supra* note 9, at 489 ("Therefore, it should not surprise us to find a positive correlation between economic diversity and overall economic growth").

262. United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (Hand, J.).

263. S. REP. NO. 81-1775 (1950); *see also* Comment, *The Amendment to Section 7 of the Clayton Act*, 46 ILL. L. REV. 444, 445 (1951) ("It may be stated that the purpose of the Amendment's proponents was clearly to halt what they considered to be a rising tide of economic concentration"); Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 191–94 (2010) (discussing the passage of the 1950 Amendments to the Clayton Act).

tion issues. In so doing, they are following modern evolutionary theory and their own traditional Confucian values and norms. Rather than portraying their AML and early competition efforts as misguidedly pursuing "non-antitrust values," perhaps we should begin seeing them as progressive and enlightened.[264]

IV. Conclusion

China today faces a daunting array of complex economic, social, and political issues. Critics will continue to question China's ability to enjoy the economic fruits of capitalism through a "socialist market economy" dedicated to ensuring "fair market competition" and widespread economic opportunity. Furthermore, China will have to come to grips with pursuing such lofty goals while dealing with economic and political corruption in a one-party political system dominated by the CCP. No easy answers or solutions await China. As it has done for thousands of years, however, China will call on its long traditions of Confucian ethics and morals in seeking to build and sustain a harmonious society and economy.

China's AML reveals China's continuing commitment to honoring and following its traditional Confucian ethics and morals. Western critics have failed to appreciate that China's AML purposely aspires to follow an evolutionary, rather than a western neoclassical economic approach, in regulating behavioral and structural competition issues in China. As a result, continuing cries for China to get in step with western neoclassical economic theory are likely to fall on deaf ears.

China should be commended for the courage and boldness of its emerging evolutionary approach to Anti-Monopoly Law. Rather than succumb to western neoclassical economic pressures and criticisms, China should continue to seek to instill and inspire evolutionary norms of Confucian morality, ethics, fairness, and reciprocity in economic competition. China also should continue to emphasize the importance of economic diversity, variation, and multiplicity in addressing structural competition issues. Should China continue following its emerging evolutionary approach to competition, China ironically may find itself in a leadership position in the global antitrust and competition law arena, as the founder of antitrust, the United States, struggles to overcome forty years of largely misguided neoclassical economics and regain its economic soul.

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264. *See* Zinzho Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECONS. 477 (concluding that "[b]ased on the experience of the merger enforcement agency, it seems that China's government is on its way to building a reputation for committing to a sound competition policy"); Adrian Emch, *Antitrust in China–The Brighter Spots*, 3 EUR. COMPETITION L. REV. 132, 138 (2011) ("While China clearly has a long way to head in its path to become a mature and globally-recognized antitrust jurisdiction, at least in a few of MOFCOM's merger-control investigations and a number of court cases, the authority and courts have followed—to some extent—an internationally accepted framework for their analysis"); Xinzhu Zhang & Vanessa Yanhua Zhang, *China's Merger Control Policy: Patterns of New Developments*, COMPETITION POL'Y INT'L: ASIA ANTITRUST COLUMN 3 (2011) ("Although it has received some criticism from scholars and practitioners, and has indeed much room for improvement, MOFCOM has been on the right track to build an independent and transparent merger review system").

DAY 2, TUESDAY, JULY 1, 2014

1. CASES
    1. *U.S. v. Andreas* (7th Cir. 2000)
    2. *U.S. v. Brown Univ.* (3rd Cir. 1993)
2. BOOK CHAPTERS
    1. China's AML: The First Five Years (pgs. 84-89)
    2. Competition Law in China (pgs. 89-91)

UNITED STATES v. ANDREAS

United States Court of Appeals for the Seventh Circuit, 2000.
216 F.3d 645.

Before: KANNE, ROVNER, and EVANS, Circuit Judges.

KANNE, Circuit Judge.

For many years, Archer Daniels Midland Co.'s philosophy of customer relations could be summed up by a quote from former ADM President James Randall: "Our competitors are our friends. Our customers are the enemy." This motto animated the company's business dealings and ultimately led to blatant violations of U.S. antitrust law, a guilty plea and a staggering criminal fine against the company. It also led to the criminal charges against three top ADM executives that are the subject of this appeal. The facts involved in this case reflect an inexplicable lack of business ethics and an atmosphere of general lawlessness that infected the very heart of one of America's leading corporate citizens. Top executives at ADM and its Asian co-conspirators throughout the early 1990s spied on each other, fabricated aliases and front organizations to hide their activities, hired prostitutes to gather information from competitors, lied, cheated, embezzled, extorted and obstructed justice.

After a two-month trial, a jury convicted three ADM officials of conspiring to violate § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which prohibits any conspiracy or combination to restrain trade. District Judge Blanche M. Manning sentenced defendants Michael D. Andreas and Terrance S. Wilson to twenty-four months in prison. They now appeal several issues

related to their convictions and sentences, and the government counter-appeals one issue related to sentencing. We find no error related to the convictions, but agree with the government that the defendants should have received longer sentences for their leadership roles in the conspiracy.

I. History

The defendants in this case, Andreas and Wilson, were executives at Archer Daniels Midland Co., the Decatur, Illinois-based agriculture processing company. Mark E. Whitacre, the third ADM executive named in the indictment, did not join this appeal.[1] ADM, the self-professed "supermarket to the world," is a behemoth in its industry with global sales of $14 billion in 1999 and 23,000 employees. Its concerns include nearly every farm commodity, such as corn, soybeans and wheat, but also the processing of commodities into such products as fuel ethanol, high-fructose sweeteners, feed additives and various types of seed oils. ADM has a worldwide sales force and a global transportation network involving thousands of rail lines, barges and trucks. The company is publicly held and listed on the New York Stock Exchange.

The Andreas family has long controlled ADM. Dwayne Andreas is a director and the former CEO, G. Allen Andreas is the board chairman and president, and various other family members occupy other executive positions. Michael D. Andreas, commonly called "Mick," was vice chairman of the board of directors and executive vice president of sales and marketing. Wilson was president of the corn processing division and reported directly to Michael Andreas.

A. The Lysine Industry

Lysine is an amino acid used to stimulate an animal's growth. It is produced by a fermentation process in which nutrients, primarily sugar, are fed to microorganisms, which multiply and metabolize. As a product of that process, the microorganisms excrete lysine, which is then harvested and sold to feed manufacturers who add it to animal feed. Feed manufacturers sell the feed to farmers who use it to raise chickens and pigs. The fermentation process tends to be very delicate, and utmost care must be used to keep the fermentation plant sterile.

Until 1991, the lysine market had been dominated by a cartel of three companies in Korea and Japan, with American and European subsidiaries. Ajinomoto Co., Inc. of Japan, was the industry leader, accounting for up to half of all world lysine sales. Ajinomoto had 50 percent interests in two subsidiaries, Eurolysine, based in Paris, and Heartland Lysine, based in Chicago. The other two producers of lysine were Miwon Co., Ltd. (later renamed Sewon Co., Ltd.) of South Korea, and Kyowa Hakko, Ltd. of Japan. Miwon ran a New Jersey-based subsidiary called Sewon America, and Kyowa owned the American subsidiary Biokyowa, Inc., which is based in Missouri.

Lysine is a highly fungible commodity and sold almost entirely on the basis of price. Pricing depended largely on two variables: the price of organic

1. At his insistence, Whitacre was tried in absentia from the prison where he is serving a 108-month sentence for embezzlement. He was represented vigorously by counsel at trial and aided his defense through telephone communication with his lawyer. Kazutoshi Yamada, an employee of Ajinomoto Co. of Japan, was the fourth defendant named in the indictment. He has not been tried and remains a fugitive.

substitutes, such as soy or fish meal, and the price charged by other lysine producers. Together, the three parent companies produced all of the world's lysine until the 1990s, presenting an obvious opportunity for collusive behavior. Indeed the Asian cartel periodically agreed to fix prices, which at times reached as high as $3.00 per pound.

In 1989, ADM announced that it was building what would be the world's largest lysine plant. If goals were met, the Illinois facility could produce two or three times as much lysine as any other plant and could ultimately account for up to half of all the lysine produced globally. Even before the plant became operational, ADM embarked on an ambitious marketing campaign aimed at attracting large American meat companies, such as Tyson Foods, in part by capitalizing on anti-Asia sentiment prevalent at the time. Also around 1990, another South Korean company, Cheil Jedang Co., began producing lysine. Despite some early difficulties with the fermenting process, the ADM plant began producing lysine in 1991 and immediately became a market heavyweight, possibly even the industry leader. The two new producers created chaos in the market, igniting a price war that drove the price of lysine down, eventually to about 70–cents per pound. The Asian companies understandably were greatly concerned by developments in this once profitable field.

B. Start of the Conspiracy

Against this background, Kyowa Hakko arranged a meeting with Ajinomoto and ADM in June 1992. Mexico City was chosen as the site in part because the participants did not want to meet within the jurisdiction of American antitrust laws. Ajinomoto was represented by Kanji Mimoto and Hirokazu Ikeda from the Tokyo headquarters, and Alain Crouy from its Eurolysine subsidiary. Masaru Yamamoto represented Kyowa Hakko, and Wilson and Whitacre attended for ADM. Mimoto, Ikeda, Crouy and Yamamoto testified as government witnesses at trial. At this meeting, the three companies first discussed price agreements and allocating sales volumes among the market participants. Wilson, who was senior to Whitacre in the corporate hierarchy, led the discussion on behalf of ADM. The price agreements came easily, and all present agreed to raise the price in two stages by the end of 1992. According to internal Ajinomoto documents prepared after the meeting, the cartel's goal was to raise the price to $1.05 per pound in North America and Europe by October 1992 and up to $1.20 per pound by December, with other price hikes for other regions. The companies agreed to that price schedule and presumed that Ajinomoto and Kyowa would convince Sewon and Cheil to agree as well.

The sales volume allocation, in which the cartel (now including ADM) would decide how much each company would sell, was a matter of strong disagreement. In ADM's view, ADM should have one-third of the market, Ajinomoto and its subsidiaries should have one-third and Kyowa and the Koreans should have the remaining third. Ajinomoto—the historical industry leader—disagreed vehemently and thought ADM did not deserve an equal portion of the market and could not produce that much lysine in any case. Wilson also suggested each company pick an auditor to whom sales volumes could be reported so that the cartel could keep track of each other's business. The meeting ended without a sales volume allocation agreement, but two

months later, at the recommendation of Whitacre, the cartel raised prices anyway, and prices rose from $.70 to $1.05 per pound.

Still, the cartel considered a price agreement without allocating sales volume to be an imperfect scheme because each company would have an incentive to cheat on the price to get more sales, so long as its competitors continued to sell at the agreed price. With cheating, the price ultimately would drop, and the agreement would falter. An effort had to be made to get the parties to agree to a volume agreement, and to that end, Whitacre invited Ajinomoto officials to visit ADM's Decatur lysine facility to prove that it could produce the volume ADM claimed. Mimoto, Ikeda and other Ajinomoto officials, including an engineer named Fujiwara, visited the plant in September 1992. At a meeting before the tour, Whitacre and Mimoto confirmed the price schedule to which the parties had agreed in Mexico City.

The cartel met again in October 1992, this time in Paris. All five major lysine producers attended, along with representatives of their subsidiaries. Wilson and Whitacre again represented ADM. To disguise the purpose of the meeting, the parties created a fake agenda, and later a fictitious lysine producers trade association, so they could meet and share information without raising the suspicions of customers or law enforcement agencies. According to the agenda, the group was to discuss such topics as animal rights and the environment. In reality, they discussed something much dearer to their hearts—the price of lysine. According to internal Ajinomoto documents, the "purpose of the meeting" was to "confirm present price level and reaction of the market, and 2, future price schedule."

Shortly after this meeting, under circumstances explained below, Whitacre began cooperating with the FBI in an undercover sting operation aimed at busting the price-fixing conspiracy. As a result, most of the meetings and telephone conversations involving Whitacre and other conspirators after October 1992 were audiotaped or videotaped.

Despite the cartel's efforts to raise prices, the price of lysine dropped in 1993. According to executives of the companies who testified at trial, without a sales volume agreement, each company had an incentive to underbid the agreed price, and consequently each company had to match the lower bids or lose sales to its underbidding competitors. This resulted in the price of lysine falling in the spring of 1993. The group, calling itself "G–5" or "the club," met in Vancouver, Canada, in June 1993 to deal with the disintegrating price agreement. Wilson and Whitacre again represented ADM. At this meeting, the Asian companies presented a sales volume allocation that limited each company to a certain tonnage of lysine per year. ADM, through Wilson, rejected the suggested tonnage assignment because it granted ADM less than one-third of the market. Ajinomoto still considered ADM's demands too high.

That summer's strong commodities market permitted frequent increases in the lysine price, to which each of the companies agreed, despite the absence of a volume allocation. The cartel's continued strong interest in a volume allocation to support the price agreement led to another meeting in Paris in October 1993. The failure to reach a volume schedule in Paris finally led to a call for a meeting between the top management at Ajinomoto and ADM: Kazutoshi Yamada and Mick Andreas.

In October 1993, Andreas and Whitacre met with Yamada and Ikeda in Irvine, California. With Whitacre's assistance, the meeting was secretly videotaped and audiotaped. Andreas threatened Yamada that ADM would flood the market unless a sales volume allocation agreement was reached that would allow ADM to sell more than it had the previous year. The four discussed the dangers of competing in a free market and hammered out a deal on volume allocations, with Andreas accepting less than a one-third share of the market in exchange for a large portion of the market's growth. Specific prices were not discussed, but Andreas acknowledged the price deal that had already been negotiated. Yamada agreed to present ADM's proposal to the other three Asian producers.

A central concern to Andreas was the difficulty he expected the Asian producers to encounter in maintaining their agreed price level. As Andreas explained at some length, the Asian companies had a more decentralized sales system that depended on agents making deals with customers. ADM featured a very centralized system in which agents played a small role in overall sales and had no discretion over price. In such an environment, maintaining control over price was easy; for the Japanese, Andreas feared it would be difficult and suggested that Ajinomoto move to a more ADM-like centralized pricing system. Andreas also expressed concern that customers could "cheat" the producers by bargaining down the price, apparently by claiming to have received lower bids from competing producers. Ikeda and Yamada agreed that customer cheating was a problem, and the four briefly discussed a quick-response system that would allow the producers to verify with each other the prices offered to particular customers.

After the Irvine meeting, the cartel met in Tokyo to work out the details of the Andreas–Yamada arrangement. All the companies except for Cheil now agreed to both tonnage maximums and percentage market shares. The group excluded Cheil from this discussion because it considered Cheil's volume demand unreasonable. The cartel, expecting the lysine market to grow in 1994, thought it wise to agree on percentages of the market that each company could have since it was possible that all five producers could sell more than their allotted tonnage. With a total expected market of 245,000 tons for 1994, Ajinomoto was to sell 84,000 tons, ADM would sell 67,000 tons, Kyowa would sell 46,000 tons, Miwon would sell 34,000 tons and Cheil, if it eventually accepted the deal, would get 14,000 tons, according to the deal hammered out by Yamada and Andreas in Irvine.

As they had before the Andreas–Yamada meeting, Wilson and Whitacre attended these Tokyo meetings for ADM. In Tokyo, Wilson suggested, and the members agreed, that each producer report their monthly sales figures by telephone to Mimoto throughout the year, and if one producer exceeded its allocation, it would compensate the others by buying enough from the shorted members to even out the allocation. The producers also agreed on a new price of $1.20 for the United States market. The agreement to buy each other's unsold allocation cemented the deal by eliminating any incentive for a company to underbid the sales price. According to Mimoto: "Since there is an agreement on the quantity allocation, our sales quantity is guaranteed by other manufacturers of the lysine. So by matching the price, to us, lowering the price is very silly. We can just keep the price." With the agreement on

prices and quantities in place, the lysine price remained at the agreed level for January and February 1994.

On March 10, 1994, the cartel met in Hawaii. At this meeting, attended by Wilson and Whitacre on behalf of ADM, the producers discussed the progress of the volume allocation agreement, reported their sales figures and agreed on prices. They also considered letting Cheil into the allocation agreement and agreed to grant the company a market share of 17,000 tons. Cheil accepted this arrangement at a meeting later that day, at which Wilson explained that the conspiracy would operate almost identically to the scheme used to fix prices in the citric-acid market. The cartel further agreed on prices for Europe, South America, Asia and the rest of the world, and discussed how the global allocations would work on a regional basis. According to the figures reported to Mimoto through May 1994, prices were maintained, and both ADM and Ajinomoto were on track to meet their sales volume limits.

In the summer of 1994, the producers met in Sapporo, Japan, for a routine cartel meeting. Whitacre represented ADM by himself. At this meeting, Sewon demanded a larger share of the market for 1995. This created a problem for the cartel, which necessitated another meeting between Andreas and Yamada. In October 1994, while on a separate business trip to the United States, Yamada met with Andreas in a private dining room at the Four Seasons Hotel in Chicago. Whitacre, Wilson and Mimoto also attended along with their bosses.

The cartel met in Atlanta in January 1995, using a major poultry exposition as camouflage for the producers being in the same place at the same time. The cartel, without the presence of Sewon, decided to cut Sewon out of the agreement for 1995 because of its unrealistic volume demand. Sewon then joined the meeting and agreed to abide by the set price, if not the volume. The group discussed the year-end sales figures for 1994, comparing them to each company's allocated volume, and discussed the new allotment for 1995. According to the 1994 numbers, each company finished fairly close to its allotted volume. The cartel met once more in Hong Kong before the FBI raided the offices of ADM in Decatur and Heartland Lysine in Chicago. These raids ended the cartel. Heartland Lysine immediately notified its home office in Japan of the search, and Ajinomoto began destroying evidence of the cartel housed in its Tokyo office. Mimoto overlooked documents stored at his home and later turned these over to the FBI. Included in these saved documents were copies of internal Ajinomoto reports of the Mexico and Paris meetings.

C. The Investigation

Mark E. Whitacre joined ADM in 1989 as president of its bioproducts division. That year, ADM announced that it would enter the lysine market dominated by Asian producers. Whitacre, who held a Ph.D. in biochemistry from Cornell University and degrees in agricultural science, answered directly to Mick Andreas. Just 32 years old when he joined the company, Whitacre's star clearly was rising fast at ADM, and some industry analysts thought he could be the next president of ADM.

In 1992, Whitacre began working with Wilson, and the two attended the first meetings of the lysine producers in Mexico City. Also in 1992, Whitacre began embezzling large sums of money from ADM and eventually stole at

least $9 million from the company by submitting to ADM phony invoices for work done by outside companies, who would then funnel the money to Whitacre's personal offshore and Swiss bank accounts. To cover up the embezzlement, Whitacre hatched a scheme in the summer of 1992 to accuse Ajinomoto of planting a saboteur in ADM's Decatur plant. Whitacre would accuse the saboteur of contaminating the delicate bacterial environment needed for the production of lysine, a story made believable because of the many early difficulties the ADM lysine plant encountered.

In accordance with the plot, Whitacre told Mick Andreas that an engineer at Ajinomoto named Fujiwara had contacted him at his home and offered to sell ADM the name of the saboteur in exchange for $10 million. The story was a lie. However, Dwayne Andreas believed it and feared it could jeopardize relations between the United States and Japan. He called the CIA, but the CIA, considering the matter one of federal law enforcement rather than national security, directed the call to the FBI, which sent agents out to ADM to interview Whitacre and other officials about the extortion. Whitacre apparently had not expected this and realized quickly that his lie would be discovered by the FBI, particularly after Special Agent Brian Shepard asked Whitacre if he could tap Whitacre's home telephone to record the next extortion demand. Whitacre knew that when the extortionist failed to call, Shepard would know Whitacre had invented the story. Whitacre confessed the scheme to Shepard, but to save himself, he agreed to become an undercover informant to help the FBI investigate price fixing at ADM. He did not come totally clean with the FBI, however; he failed to mention the millions he embezzled and in fact continued to embezzle after he began working for the government. For the next two-and-a-half years, Whitacre acted as an undercover cooperating witness—legally a government agent—and secretly taped hundreds of hours of conversations and meetings with Wilson, Mick Andreas and the other conspirators. In addition, the FBI secretly videotaped meetings of the lysine producers.

Whitacre made between 120 and 130 tapes for the FBI during the investigation, beginning with a November 9, 1992, conversation with Yamamoto, by using recording equipment, tapes and instruction provided by the government. FBI agents met with Whitacre more than 150 times during the investigation. The tapes were collected and reviewed usually within a day or two of the FBI receiving them, and Department of Justice (DOJ) attorneys regularly participated in reviewing the tapes and monitoring the supervision of Whitacre. However, the FBI's supervision of Whitacre was not flawless. Whitacre was, to say the least, a difficult cooperating witness to handle. Whitacre lied to the FBI during the probe, failed polygraph tests, bragged to his gardener about his role as an FBI mole, all while continuing to embezzle millions of dollars from the company. He even envisioned himself ascending to the ADM presidency as a hero once Andreas, Wilson and Randall were taken down in the FBI sting. In short, he was out of control, and the FBI struggled to keep him on track. Nonetheless, the FBI and the DOJ considered him the best opportunity to stop a massive price-fixing scheme.

* * *

economic values, one might sacrifice to some extent the promise of lower consumer prices and other benefits associated with efficient markets.

Although less likely to prove influential today, in the past these kinds of non-economic goals consistently found expression in the antitrust decisions of the federal courts. In the first decade following adoption of the Sherman Act, the Supreme Court invoked those purposes in a much-quoted passage from its decision in *Trans-Missouri Freight*:

> [The result of a combination of capital controlling the price of a commodity] * * * is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers, who were familiar with the business, and who spent their lives in it, and who supported themselves and their families from the small profits realized therein. * * * [I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 324 (1897). A similarly famous expression of this perspective appeared in *United States v. Aluminum Co. of America*, 148 F.2d 416, 428–29 (2d Cir.1945), where Judge Learned Hand's opinion observed:

> We have been speaking only of the economic reasons which forbid monopoly; but * * * there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. * * * Throughout the history of [the federal antitrust laws] * * * it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

There are many other examples in the older antitrust cases. But for the most part, modern U.S. antitrust jurisprudence has subordinated non-economic goals to the attainment of economic efficiency. Nevertheless, non-economic goals occasionally find expression in modern judicial decisions. In the following excerpt from *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), the court of appeals assesses whether it should consider the diversity and social welfare goals of a university's scholarship program in analyzing antitrust claims.

UNITED STATES v. BROWN UNIVERSITY

United States Court of Appeals for the Third Circuit, 1993.
5 F.3d 658.

Before: MANSMANN, COWEN and WEIS, Circuit Judges.

COWEN, Circuit Judge.

The Antitrust Division of the United States Department of Justice ("Division") brought this civil antitrust action against appellant Massachu-

setts Institute of Technology ("MIT") and eight Ivy League colleges and universities. The Division alleged that MIT violated section one et seq. of the Sherman Anti–Trust Act by agreeing with the Ivy League schools to distribute financial aid exclusively on the basis of need and to collectively determine the amount of financial assistance commonly admitted students would be awarded.

The district court entered judgment in favor of the Division. * * * [W]e hold that the district court erred by failing to adequately consider the procompetitive and social welfare justifications proffered by MIT and by deciding the case on the basis of an abbreviated rule of reason analysis. * * *

I. FACTUAL AND PROCEDURAL BACKGROUND

* * *

In 1958, MIT and the eight Ivy League schools formed the "Ivy Overlap Group" to collectively determine the amount of financial assistance to award to commonly admitted students. The facts concerning this Agreement are essentially undisputed. The Ivy Overlap Group expressly agreed that they would award financial aid only on the basis of demonstrated need. Thus, merit-based aid was prohibited. To ensure that aid packages would be comparable, the participants agreed to share financial information concerning admitted candidates and to jointly develop and apply a uniform needs analysis for assessing family contributions.

* * *

Although each Ivy Overlap institution employed the same analysis to compute family contributions, discrepancies in the contribution figures still arose. To eliminate these discrepancies, the Overlap members agreed to meet in early April each year to jointly determine the amount of the family contribution for each commonly admitted student. Prior to this conference, the Overlap schools independently determined the family contribution of each student they admitted, and transmitted this data to Student Aid Services. Student Aid Services then compiled rosters. A bilateral roster listed aid applicants who were admitted to two Ivy Overlap Group schools, and a multilateral roster compiled applicants admitted to more than two participating schools. For each student, the rosters showed each school's student budget, proposed student and parent contributions, self-help levels, and grant awards.

At the two-day spring Overlap conference, the schools compared their family contribution figures for each commonly admitted student. Family contribution differences of less than $500 were ignored. When there was a disparity in excess of $500, the schools would either agree to use one school's figure or meet somewhere in the middle. Due to time constraints, the schools spent only a few minutes discussing an individual and the agreed upon figures were more a result of compromise than of a genuine effort to accurately assess the student's financial circumstances.

All Ivy Overlap Group institutions understood that failing to comply with the Overlap Agreement would result in retaliatory sanctions. Consequently, noncompliance was rare and quickly remedied. * * *

In 1991, the Antitrust Division of the Justice Department brought this civil suit alleging that the Ivy Overlap Group unlawfully conspired to restrain trade in violation of section one of the Sherman Act, 15 U.S.C. § 1, by (1) agreeing to award financial aid exclusively on the basis of need; (2) agreeing to utilize a common formula to calculate need; and (3) collectively setting, with only insignificant discrepancies, each commonly admitted students' family contribution toward the price of tuition. The Division sought only injunctive relief. All of the Ivy League institutions signed a consent decree with the United States, and only MIT proceeded to trial. * * *

* * *

III. RESTRAINT OF TRADE

* * *

MIT does not dispute that the stated purpose of Overlap is to eliminate price competition for talented students among member institutions. Indeed, the intent to eliminate price competition among the Overlap schools for commonly admitted students appears on the face of the Agreement itself. * * * Because the Overlap Agreement aims to restrain "competitive bidding" and deprive prospective students of "the ability to utilize and compare prices" in selecting among schools, it is anticompetitive "on its face." We therefore agree that Overlap initially "requires some competitive justification even in the absence of a detailed market analysis."

* * *

On appeal, MIT first contends that by promoting socio-economic diversity at member institutions, Overlap improved the quality of the education offered by the schools and therefore enhanced the consumer appeal of an Overlap education. The Supreme Court has recognized improvement in the quality of a product or service that enhances the public's desire for that product or service as one possible procompetitive virtue. The district court itself noted that it cannot be denied "that cultural and economic diversity contributes to the quality of education and enhances the vitality of student life." * * *

MIT also contends that by increasing the financial aid available to needy students, Overlap provided some students who otherwise would not have been able to afford an Overlap education the opportunity to have one. In this respect, MIT argues, Overlap enhanced consumer choice. The policy of allocating financial aid solely on the basis of demonstrated need has two obvious consequences. First, available resources are spread among more needy students than would be the case if some students received aid in excess of their need. Second, as a consequence of the fact that more students receive the aid they require, the number of students able to afford an Overlap education is maximized. In short, removing financial obstacles for the greatest number of talented but needy students increases educational access, thereby widening consumer choice. Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit.[10]

10. To the extent that increasing consumer choice and promoting socioeconomic diversity in the context of higher education reflect social as well as procompetitive values, the district

Finally, MIT argues that by eliminating price competition among participating schools, Overlap channeled competition into areas such as curriculum, campus activities, and student-faculty interaction. As the Division correctly notes, however, any competition that survives a horizontal price restraint naturally will focus on attributes other than price. This is not the kind of procompetitive virtue contemplated under the Act, but rather one mere consequence of limiting price competition.

MIT next claims that beyond ignoring the procompetitive effects of Overlap, the district court erroneously refused to consider compelling social welfare justifications. MIT argues that by enabling member schools to maintain a steadfast policy of need-blind admissions and full need-based aid, Overlap promoted the social ideal of equality of educational access and opportunity.

* * *

[Here the court of appeals discussed evidence that Congress sought to promote the "same ideal of equality of educational access and opportunity" and MIT's efforts in the district court to establish that Overlap promoted "similar social and educational policy objectives." It also pointed out that the district court was not persuaded that the social welfare values asserted by MIT could be equated with "procompetitive justifications," owing to the Supreme Court's decisions in *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978)(Casebook, *infra*, Chapter 2) and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). In *Nat'l Soc'y of Prof'l Eng'rs*, the Court had rejected public safety concerns as a valid defense to a Sherman Act challenge to a ban on all competitive bidding that was contained in the Society's Code of Ethics; in *Indiana Fed'n of Dentists*, the Court similarly rejected a defense based on alleged public health concerns, proffered by the dentists to justify their ban on supplying insurance companies with dental x-rays. Eds.]

Both the public safety justification rejected by the Supreme Court in *Professional Engineers* and the public health justification rejected by the Court in *Indiana Dentists* were based on the defendants' faulty premise that consumer choices made under competitive market conditions are "unwise" or "dangerous." Here MIT argues that participation in the Overlap arrangement provided some consumers, the needy, with additional choices which an entirely free market would deny them. The facts and arguments before us may suggest some significant areas of distinction from those in *Professional Engineers* and *Indiana Dentists* in that MIT is asserting that Overlap not only serves a social benefit, but actually enhances consumer choice. Overlap is not an attempt to withhold a particular desirable service from customers, as was the professional combination in *Indiana Dentists*, but rather it purports only to seek to extend a service to qualified students who are financially "needy" and would not otherwise be able to afford the high cost of education at MIT. Further, while Overlap resembles the ban on competitive bidding at issue in *Professional Engineers*, MIT alleges that Overlap enhances competition by broadening the socio-economic sphere of its potential student body. Thus, rather than suppress competition, Overlap may in fact merely regulate

court should have considered the degree to which Overlap furthered these social objectives. * * *

competition in order to enhance it, while also deriving certain social benefits. If the rule of reason analysis leads to this conclusion, then indeed Overlap will be beyond the scope of the prohibitions of the Sherman Act.

* * *

The nature of higher education, and the asserted procompetitive and pro-consumer features of the Overlap, convince us that a full rule of reason analysis is in order here. It may be that institutions of higher education "require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."

It is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education. There is no doubt, too, that enhancing the quality of our educational system redounds to the general good. To the extent that higher education endeavors to foster vitality of the mind, to promote free exchange between bodies of thought and truths, and better communication among a broad spectrum of individuals, as well as prepares individuals for the intellectual demands of responsible citizenship, it is a common good that should be extended to as wide a range of individuals from as broad a range of socio-economic backgrounds as possible. It is with this in mind that the Overlap Agreement should be submitted to the rule of reason scrutiny under the Sherman Act.

* * *

Brown University is noteworthy on a number of fronts. In the passage reproduced above, we see the court attempting to distinguish earlier Supreme Court decisions that rejected attempts to justify trade restraints by arguing that competition itself was unreasonable. Is the effort persuasive? Is the Third Circuit's effort to effectuate the social and economic aims of the overlap policy consistent with the Supreme Court's teaching? Are you persuaded that the Overlap was "pro-competitive" in some economic sense?

In Sidebar 1–2, which follows, we consider some of the traditional arguments for and against giving weight to non-economic goals and their current status under U.S. antitrust law. We also note some of the various ways that non-economic goals continue to have influence outside of antitrust.

competition and "diminish social welfare, create allocative inefficiency and transfe wealth from consumers to the participants in the cartel."[3]

On August 1, 2008, with the entry into force of the Anti-Monopoly Law (AML), a comprehensive competition regime was established in China.[4] Although China follows suit in general in terms of tackling cartels, being a new competition regime, many of its features remain its own and differ from other countries. This article aims at introducing the key features of China's cartel law and enforcement. A description of the legal framework is set out in Section §6.02. The competition authorities new to their offices have plenty of room to explore novel means of enforcement. It is clear that the competition authorities have tried to explore their new enforcement tools in many cases, as can be seen from Section §6.03 on enforcement actions. Section §6.04 provides conclusive remarks.

§6.02 LEGAL FRAMEWORK IN CHINA

[A] Cartel Related Laws and Rules

Before the enactment of the AML, there were laws in place in China preventing and punishing "cartel" type of infringements, for example, the Price Law,[5] the Anti-Unfair Competition Law,[6] the Tender and Bidding Law,[7] and the Government Procurement Law:[8]

- Under Article 14 of the Price Law, price fixing conspiracies in various forms are prohibited.[9]
- Chapter 2 of the Anti-Unfair Competition Law prohibits various types of unfair competitive behaviors including collusive bidding.
- The Tender and Bidding Law provides detailed guidance for both public bidding and bidding upon request. Collusion at various stages of the bidding activities is prohibited.
- The Government Procurement Law prohibits any collusive conduct in government procurement activities in China, including *inter alia* discrimination by purchaser towards providers.[10]

3. European Commission 22nd Report on Competition Policy (2002), point 26.
4. Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.
5. Price Law of the People's Republic of China, [1997] Presidential Order No. 92, Dec. 29, 1997.
6. Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No. 10, Sep. 2, 1993.
7. Tender and Bidding Law of the People's Republic of China, [1999] Presidential Order No. 21, Aug. 30, 1999.
8. Government Procurement Law of the People's Republic of China, [2002] Presidential Order No. 68, Jun. 29, 2002.
9. There is an administrative regulation called the Regulation on Administrative Penalties for Illegal Pricing Conduct, which was introduced for implementing of the Price Law in 1999 and was revised in 2006, 2008 and 2010.
10. Government Procurement Law of the People's Republic of China, [2002] Presidential Order No. 68, Jun. 29, 2002, Art. 22.

These rules safeguard China's economy by laying down the boundaries of healthy competition and building the foundation for the AML. With the enactment of the AML, issues arise concerning the consistency of law application by the enforcement authorities, as sanctions under different rules are different. Despite such issues, since then, the two enforcement authorities in charge of tackling monopolistic conduct, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC), have not spared any effort in issuing rules to clarify the high level provisions of the AML. Though the prevention, detection and elimination of cartels is not their sole purpose, the following rules published by NDRC and SAIC are applicable in cartel cases:

- the Anti-Price Monopoly Regulation[11] by NDRC entering into force on February 1, 2011;
- the Regulation on the Administrative Law Enforcement Procedure for Anti-Price Monopoly[12] by NDRC on February 1, 2011;
- the Regulation on the Procedure for the Handling of Cases Involving Monopoly Agreements and Abuses of a Dominant Market Position[13] by SAIC on July 1, 2009; and
- the Regulation on the Prohibition of Monopoly Agreement Conduct[14] by SAIC on February 1, 2011.

[B] What Is a "Cartel" under the AML?

Although the word "cartel" is not mentioned either in the AML or in the rules implementing the AML, a cartel is still widely recognized by practitioners, academics and officials alike in China as being the most serious competition law infringement. Article 13 of the AML sets forth the overarching prohibition against horizontal monopoly agreements. From the wording in Article 13, all of the listed horizontal monopoly agreements are "prohibited," indicating the nature of their seriousness.

Prohibited horizontal monopoly agreements include agreements:

- to fix or change the prices of products;
- to restrict the production quantity or sales volume of products;
- to divide the sales market or the raw material procurement market;
- to restrict the purchase of new technology or new equipment, or the development of new technology or new products; and
- to jointly boycott transactions.[15]

11. Anti-Price Monopoly Regulation, [2010] NDRC Order No. 7, Dec. 29, 2010.
12. Regulation on the Administrative Enforcement Procedure for Anti-Price Monopoly, [2010] NDRC Order No. 8, Dec. 29, 2010.
13. Regulation on the Procedure for the Handling of Cases Involving Monopoly Agreements and Abuses of a Dominant Market Position, [2009] SAIC Order No. 42, Jun. 5, 2009.
14. Regulation on the Prohibition of Monopoly Agreement Conduct, [2010] SAIC Order No. 53, Dec. 31, 2010.
15. AML, Art. 13(1).

Although bid-rigging is not listed in Article 13 as a prohibited horizontal agreement, it is caught by Article 7(4) of the Anti-Price Monopoly Regulation. In fact, as compared to price-fixing, output restriction and market sharing, which were introduced by the AML in 2008, bid-rigging has long been recognized under the Anti-Unfair Competition Law and the Tender and Bidding Law as illegal conduct in China. There is even a possibility to impose criminal sanctions of up to three years of imprisonment for serious bid-rigging activity under the Criminal Law.[16]

[C] Enforcement Authorities

In China, there are two authorities working in parallel, enforcing laws against monopoly agreements. As the macro economy planner and the price regulator, NDRC administers price-related monopolistic agreements. The relevant bureau within NDRC is the Price Supervision and Anti-Monopoly Bureau. SAIC is responsible for tackling non-price-related monopoly agreements. Within SAIC, the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau takes charge of the enforcement of the AML as well as the Anti-Unfair Competition Law. NDRC and SAIC act both individually and jointly in deterring and eradicating hardcore cartels in China.

Both NDRC and SAIC have delegated authority to their offices at the provincial level. The delegation by NDRC is made on a general basis, whereas SAIC presently only delegates its authority on a case-by-case basis for cartel investigation.

Clearly, most enforcement actions so far by these two authorities have been in relation to hardcore cartels, in particular price-fixing cartels—the most prominent one being the *LCD panels* case.

[D] Burden of Proof

United States (US) law has for many decades treated hardcore cartels as per se infringements of the Sherman Act. The existence of a cartel itself is sufficient for its illegality. No further inquiry is needed, and no defense is allowed.[17] In the European Union (EU), cartels are considered to be restrictions of competition by object. A bright-line test is applied, concluding that cartels have such a pernicious effect that they are automatically assumed to restrict competition. This has a critical effect on the burden of proof—the onus will be on the parties to the agreement to defend it and establish the case under Article 101(3) of the Treaty on the Functioning of the European Union. In order to benefit from Article 101(3), an agreement must satisfy four requirements, two positive conditions (efficiency gain and consumers' share of benefit) and two negative conditions (*no* indispensable restriction and *no* substantial elimination of competition).

16. Criminal Law of the People's Republic of China, [1997], Presidential Order No. 83, Mar. 14, 1997, as amended, Art. 223.
17. Cuong, *Nguyen Van, Illegality of Cartel: Comparative Study of Criteria in the U.S, EC and Japan and their Implications for Vietnam*, Sep. 17, 2004, http://ssrn.com/abstract=1269589 or http://dx.doi.org/10.2139/ssrn.1269589 (accessed Jan. 25, 2013).

A logical reading of the AML shows that the horizontal agreements listed under Article 13 of the AML are prohibited per se.[18] Right now, there is no need for the enforcement authorities to prove anti-competitive effects. Once such a behavior is established, the burden will shift to the perpetrator to prove that the conditions of Article 15 of the AML are met. More recently on May 3, 2012, the Supreme People's Court published its Provisions on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (Judicial Interpretation), which further shed light on this issue.[19]

Article 7 of the Judicial Interpretation provides that the defendant in civil proceedings shall bear the burden to prove the lack of exclusionary or restrictive effect on competition by the challenged monopoly agreements, when it comes to the five types of horizontal agreements listed in Article 13(1)(1) to (5) of the AML.[20] That means that the plaintiff does not need to prove anti-competitive effects of the monopoly agreements under Article 13(1)(1) to (5) of the AML in civil litigation. Such effect is presumed, and the burden of proof is on the defendant to prove the lack of such effect. Article 7 of the Judicial Interpretation corresponds to the US/EU approach in that the plaintiff does not bear the burden of proof on the anti-competitive effects of cartels. However, it also differs from the US/EU approach. Under the Judicial Interpretation, if the defendant succeeds in proving the lack of anti-competitive effects, there will be no violation of the AML. In contrast, in the US, the lack of anti-competitive effect of a cartel is not a viable defense, though it may be relevant to the amount of fines imposed. In the EU, the object test is applied to cartels. An anti-competitive effect is not needed for the determination of a cartel. It is not relevant, for example, that a cartel member intended to cheat on the cartel in the first place and did not actually change its competitive behavior.[21]

[E] The Role of Associations in Cartels

The prohibition against monopolistic agreements also applies to associations of companies. It aims at catching the institutionalized forms of coordination, where companies act via a common body or collective structure. Associations of companies provide a forum for competitors in a particular industry to get together, discuss matters of common interest, and exchange information. They are, therefore, a perfect vehicle through which companies of a particular industry can collude on their market

[18] *See also* Anti-Price Monopoly Regulation, [2010] NDRC Order No. 7, Dec. 29, 2010, Art. 10; and Regulation on the Administrative Enforcement Procedure for Anti-Price Monopoly, [2010] NDRC Order No. 8, Dec. 29, 2010, Art. 13.

[19] Provisions by the Supreme People's Court on Several Issues concerning the Application of the Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, [2012] Judicial Interpretation No. 5, May 3, 2012.

[20] However, there is no similar provision in the Judicial Interpretation for vertical agreements. This means that the plaintiff still bears the burden of proving that the challenged vertical agreements have anti-competitive effects.

[21] See Case 246/86, *BELASCO*, [1989] ECR 2117.

behavior. In fact, meetings in industry associations have spawned and/or provided cover for a number of major global cartels.[22]

Under Article 16 of the AML, industry associations are specifically prohibited from assisting companies in their industry to enter in monopoly agreements (including, of course, cartel activities). This provisions emphasizes that the actions of trade or industry associations are included in the scope of the AML, regardless of the fact that they are not themselves business operators and have no economic activities of their own. Collusion through associations has been a frequent target of both NDRC and SAIC's enforcement actions against cartels recently, for example, in the *Book resale price* case, the *Pre-mixed concrete* case, the *Paper manufacturing* case, the *Package* case, and the *Sea sand* case.

[F] Leniency

Internationally, a well-designed leniency program has been identified as one of the most effective tools to fight hardcore cartels. China is no exception. Both NDRC and SAIC have adopted leniency programs in their battle against cartels. While both programs share the same goal, they are different in various important aspects.

First, ring-leaders can apply for leniency under the NDRC leniency program (*see Sea sand* case), but they are barred from doing so under SAIC's program. Second, the first leniency applicant that provides important evidence is granted immunity by SAIC, whereas under the NDRC program it is only a possibility that the first applicant may be granted immunity. Third, the second leniency applicant before NDRC can be granted a reduction in its fine of no less than a 50%. For any other subsequent leniency applicants, NDRC can grant a reduction of up to 50% of its fine. In contrast, under the SAIC leniency program, there is no specific reference to any subsequent leniency applicants other than the first one, nor is there any reference to the reduction percentage for those subsequent leniency applicants.

It thus appears that the SAIC rules give more certainty to the first leniency applicant, but less for subsequent ones. None of the cases where leniency has been applied so far, such as the *Sea sand* case, involves the interplay between the leniency programs of NDRC and SAIC. It remains to be seen how such discrepancy would play out in cases which involve both price and non-price factors and whether it would encourage forum shopping in leniency applications.

Moreover, given the different treatment of whistle-blowers based on their order of application, an important question is how to rank the order of their applications. In China, there is no equivalent of the EU's "marker system," and such uncertainty may discourage business operators from filing leniency applications.

In addition to the difference in rules of NDRC and SAIC, there is also an issue on the choice of law between the AML and the Price Law when it comes to leniency. In contrast to the leniency program under the AML, there is no formal leniency program

22. *See* Case C-309/99, *Wouters*, [2002] ECR I-577; and Cases 209–215 and 218/78, *Van Landewyck and Others v. European Commission*, [1980] ECR 3125.

available under the Price Law. It is however possible for companies to obtain reductions of fines under the general administrative rules. This is what appeared to have happened in the *LCD panels* case.

[G] Fines

For cartel infringements, fines of up to RMB 500,000 can be imposed on industry associations that organize the conclusion of monopoly agreements for companies in their industry, or on companies which have not yet implemented the monopoly agreement. For a company which has implemented a monopoly agreement, a fine between 1% and 10% of its sales turnover for the preceding financial year can be imposed. Such 1%–10% range resembles that under the EU regime. However, in China, it is not clear whether the concept of "previous financial year" relates to the year before the violation, the year before the initiation of the investigation, or the year before the decision of the case. Similarly, there are doubts as to whether such percentage is based on the worldwide turnover, the local turnover in China or parts of China, and whether such turnover is based on the company's full business lines or just the relevant business segment affected by the cartel activities. Furthermore, it is not clear what steps are to be taken in order to calculate the fines or whether there are any mitigating or aggravating factors in its calculation. This ambiguity could clearly make a big difference in the final amount of fines being imposed.

As can be seen in Section §6.03 below, many of the cases, where fines have been imposed for price-related cartel violations so far, have been based on the Price Law. Different from the AML, there is more certainty in relation to fines under the Price Law and sanctions under the Price Law are much less severe than those under the AML, except where the illegal gains are substantial.[23] Under the Price Law and its implementing administrative regulation, the fine shall be less than five times of the illegal gains. In cases where no illegal gain is involved, a fine of up to RMB 5 million[24] can be imposed on firms, and up to RMB 500,000 on individuals.

§6.03 ENFORCEMENT PRACTICE IN CHINA

[A] Overview of the Enforcement

It has been close to five years since the AML came into force. In the first two years, NDRC and SAIC dedicated most of their resources to developing the AML and issuing implementing rules to provide more guidance and clarification. As a result, the antitrust authorities were very prudent with investigations. Very few cases were disclosed during this period. After two price-related antitrust regulations (by NDRC) and five non-price-related regulations (by SAIC) were adopted, NDRC and SAIC, as

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[23] Price Law of the People's Republic of China, [1997] Presidential Order No. 92, Dec. 29, 1997, Art. 40.

[24] This fine can be in different ranges depending on the type of conduct.

Part II. The Application of the Prohibitions

Chapter 1. Restrictive Agreements

212. See paragraphs 72–74 above for an overview of the AML provisions on restrictive agreements. The AML and the competition provisions in other laws and regulations do not provide for a notification system for monopoly agreements. It is possible that the NDRC or the SAIC may adopt block exemptions and consultation procedures with respect to horizontal or vertical agreements in the future. At present, self-assessment by the parties to a horizontal or vertical agreement is necessary in order to ensure compliance.

§1. Horizontal Agreements

I. Cartels

213. Price fixing, market allocation, and output limitation are deemed to be hard-core cartels in mature antitrust jurisdictions and it is unlikely that hard-core cartels will satisfy the criteria for exemption or be treated under the reasonableness test. However, it is still unclear whether hard-core cartels will be treated as per se illegal under the AML or subject to the AML exemption rules, depending on the circumstances.[1] Apart from the AML, other competition-related laws, including the AUCL, the Price Law, and the Bidding Law, contain provisions governing cartel arrangements.

1. AML, Art. 15.

A. Price Fixing

214. The AML prohibits the collusive fixing or changing of prices among competing undertakings.[1] Under the Price Law, undertakings are prohibited from colluding with each other to manipulate the market price and to harm the lawful rights and interests of other undertakings or consumers.[2]

1. AML, Art. 13(1).
2. Price Law, Art. 14(1).

215. The Measures on the Prohibition of Price Monopoly detail the circumstances in which horizontal price fixing agreements are prohibited under the AML. Competing undertakings are prohibited from: (1) fixing or changing prices; (2) fixing or changing the range of price changes; (3) fixing or changing commissions, discounts or other fees that affect prices; (4) using an agreed price as a benchmark for negotiating with third parties; (5) setting a standard formula for pricing; (6) agreeing that prices may not be changed without other undertakings' consent; (7) fixing or changing prices through other means; and (8) other price fixing agreements as determined by the NDRC.[1]

1. Measures on the Prohibition of Price Monopoly, Art. 7.

216. Cartel activities, especially price fixing, have been widely reported in China over the years and appear to be commonplace, even after the enactment of the AML. As the enforcement authority responsible for price-related infringements under the AML and for the Price Law, the NDRC and its local bureaus have taken actions tackling a number of price fixing cartels since the AML entered into force in 2008.

217. The Rice Noodle Cartel. In March 2010, the NDRC's local price bureau in the Guangxi province punished a number of local rice noodle producers for colluding to increase and fix prices for rice noodles. The local bureau found that the cartel leaders held meetings to discuss pricing, coerced other producers to join the cartel, and eventually reached an agreement to collectively increase prices and to share the profits derived from the price cartel. The local bureau relied on the AML and the Price Law and fined three leading producers of rice noodles CNY 100,000 each, and other eighteen producers of rice noodles between CNY 30,000 and 80,000 each. Twelve producers of rice noodles received leniency in return for cooperation with the investigation.[1]

1. NDRC, 'Rice Noodle Producers in Nanning and Liuzhou Investigated and Penalized for Colluding in Price Increases' (in Chinese), <http://jjs.ndrc.gov.cn/fjgld/t20100331_338262.htm>, 31 Mar. 2010.

218. The Green Bean and Garlic Cartel. In July 2010, the NDRC Price Supervision Department, together with the MOFCOM Department of Market Supervision and the SAIC Department of Market Regulation, announced that three decisions had been made by local price authorities in Inner Mongolia, Shandong, Henan, and Guangdong in relation to collusion and manipulation of prices of green beans and garlic. It was alleged that the Jilin Corn Centre Wholesale Company led and cooperated with other companies, through meetings and other means, to fabricate and disseminate information on price increases and to collude to increase the price of green beans. It received a fine of CNY 1 million, which has been the most serious penalty to date since the enactment of the AML. Several cooperating companies received fines of CNY 500,000, and warnings were issued to 109 agricultural trading companies alleged to have joined the cartel. The trade associations and trading

companies in the Henan and Shandong provinces who were alleged to have colluded to increase the price of garlic were fined between CNY 80,000 and 100,000 each.[1]

1. NDRC, 'NDRC, MOFCOM and SAIC Announced the Investigation against and Penalties Imposed on Hoarding and Price Collusion of Agricultural Products' (in Chinese)<http://jjs.ndrc.gov.cn/gzdt/t20100702_358457.htm>, 2 Jul. 2010.

B. Market/Client Allocation

219. The AML prohibits the allocation of sales market or raw material procurement market among competing undertakings.[1] The Measures on the Prohibition of Monopoly Agreements further set forth the AML rule on market allocation and prohibits competing undertakings from allocating: (1) sales regions, targets, categories, and volumes; (2) procurement regions, categories, and volumes of raw materials, semi-finished goods, parts and components, and related equipment; and (3) suppliers of raw materials, semi-finished goods, parts and components, and related equipment.[2]

1. AML, Art. 13(3).
2. Measures on the Prohibition of Monopoly Agreements, Art. 5.

220. Concrete manufacturer association penalized for market allocation. It is reported that, in early 2011, the Jiangsu Province Administration for Industry and Commerce, a local arm of SAIC, has penalized the Concrete Manufacturer Association of Lianyungang City for market sharing and fixing market shares. Officials at the Jiangsu Province Administration for Industry and Commerce said that, in March 2009, the association organized for sixteen members to reach several 'self-disciplinary agreements' that were aimed at coordinating competition and monopolizing the market. The association allocated sales markets and units according to its members' capacities and equipment. Until August 2010, the association organized several meetings to discuss the allocation of projects and deterrent mechanisms. The association also obstructed its members' ability to enter into sales agreements with customers, which directly caused the suspension of several local construction projects. The Jiangsu Province Administration for Industry and Commerce found that the association breached the AML and imposed fines of CNY 730723.19 on and confiscated illegal gains of CNY 136481.21 of the association and the relevant parties.[1]

1. Xinhua News Agency, 'Trade Association Allocated Market Share; Jiangsu Completed the First Anti-Monopoly Investigation' (in Chinese), <www.js.xinhua.org/xin_wen_zhong_xin/2011-01/21/content_21923072.htm>, 21 Jan. 2011; Global Competition Review, 'SAIC Takes First Enforcement Steps', <www.globalcompetitionreview.com/news/article/29809/saic-takes-first-enforcement-steps/>, 2 Mar. 2011.

DAY 3, WEDNESDAY, JULY 2, 2014

1. READINGS

    1. Horton/Huang – Analyzing Information Exchanges between Competitors under the AML (2013) (pgs. 95-108; 117)

    2. AML and Practice in China (2011) (pgs. 59-64)

    3. Cases

        a. *Natl. Soc. Engins.* (excerpts)

        b. *FTC v. Sup. Ct. Trial Lawyers* (excerpts)

7 Analyzing Information Exchanges between Competitors under the Anti-Monopoly Law

*Thomas J. HORTON & Jenny Xiaojin HUANG**

§7.01 INTRODUCTION

In global competition, antitrust and anti-monopoly circles throughout the world, it has long been understood "that many information exchanges between competitors can be efficiency-enhancing and procompetitive."[1] As an example, the Organisation for Economic Co-operation and Development (OECD) Competition Committee met in October 2010 to debate the various aspects of potential information exchanges between competitors, and released a detailed and exhaustive 485 page report.[2] In the Report's Executive Summary, the OECD Secretariat appropriately observed that "[i]n the course of doing business, companies can—and often do—exchange various types of information through different channels, which leads to increased transparency in the market which can bolster allocative and productive efficiencies...."[3]

However, it is equally well recognized in the United States, the European Union (EU) and other jurisdictions throughout the world that exchanges of "sensitive business information may allow competitors to successfully collude or coordinate price

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1 Thomas J. Horton & Stefan Schmitz, *The Lessons of Covisint: Regulating B2Bs Under European and American Competition Laws*, 47 WAYNE L. REV. 1, 36 (2001). *See also* ABA SECTION OF ANTITRUST LAW, A PRIMER ON THE LAW OF INFORMATION EXCHANGE: A GENERAL REVIEW OF THE LAW OF BENCHMARKING AND INFORMATION EXCHANGE FOR BUSINESS MANAGERS (2d ed. 2002); and ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 97–102 (7th ed. 2012).

2 *Information Exchanges Between Competitors Under Competition Law-2010*, OECD Policy Roundtable Report (Jul. 11, 2011), http://www.oecd.org/competition (accessed Jan. 9, 2013).

3 *Id.*, at 9.

increases and output reductions."[4] As recently stated by the OECD, "[t]he exchange of information can facilitate collusion among competitors by allowing them to establish coordination, monitor adherence to coordinated behavior and effectively punish any deviations."[5] Furthermore, information exchanges between competitors "may lead to market foreclosure."[6] In both the United States and the EU, a long line of cases have condemned the sharing of information that could lead to coordinated price increases or output reductions.[7] Furthermore, a number of courts in the United States have permitted "proof that competitors have shared information [to] serve[] as evidence of a per se illegal conspiracy to fix prices."[8]

For this complex area of competition law enforcement, "[g]enerally, competition laws of different jurisdictions around the world do not have specific provisions dealing with exchanges of information. Instead, these are dealt within the framework of traditional prohibitions against cartel agreements and/or concerted practices."[9] However, various jurisdictions have issued guidelines relevant to information exchanges between competitors.[10] Although these guidelines have not ended the debates on this topic,[11] a consensus seems to have been reached that while certain factors, such as the nature, content and context of the disclosure allow for general categorizations that

4. Thomas J. Horton & Stefan Schmitz, *The Lessons of Covisint: Regulating B2Bs Under European and American Competition Laws*, 47 WAYNE L. REV. 1, 36-37 (2001).
5. *Information Exchanges Between Competitors Under Competition Law-2010*, OECD Policy Roundtable Report (Jul. 11, 2011), http://www.oecd.org/competition (accessed Jan. 9, 2013), at 11.
6. In fairness, the OECD Report further notes that "it was generally felt that this risk is not particularly high and no problematic cases of this type were reported." *Id.*
7. *See, e.g., Sugar Inst. v. United States*, 297 U.S. 553 (1936); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); Commission Decision 77/592, Case IV/3120366, COBELPA/VNP, 1977 O.J. (L 242) 10; Case IV/M 31.128, Fatty Acids, 1987 O.J. (L 3) 17; Commission Decision 92/157, UK Agricultural Tractor Registration Exchange, 1992 O.J. (L 68) 19; Commission Decision 78/252, Case IV/29.176, Vegetable Parchment, 1978 O.J. (l 70) 54; Case IV/M 29.535, White Lead, 1979 O.J. (L 21) 16.
8. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 98 (7th ed. 2012); and cases cited therein. As an example, in *In re Petroleum Products Antitrust Litig.*, the Ninth Circuit ruled that exchanges of price information could be treated as a "plus factor" from which a jury could infer a price-fixing agreement. In re Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445-450 (9th Cir. 1990).
9. *Information Exchanges Between Competitors Under Competition Law-2010*, OECD Policy Roundtable Report (Jul. 11, 2011), http://www.oecd.org/competition (accessed Jan. 9, 2013), at 9.
10. For e.g., in January 2011, the European Commission issued the Guidelines on the Applicability of Art. 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements. These 2011 Guidelines include an extensive discussion in sec. 2 of the "General Principles on the Competitive Assessment of Information Exchange." Similarly, in December 2004, the Office of Fair Trade of the United Kingdom released formal guidance on Agreements and Concerted Practices. In November 2011, the Australian government passed the Competition and Consumer Amendment Act (No. 1) 2011, which commenced on Jun. 6, 2012. The Act prohibits anti-competitive price signaling and other information disclosures in the banking sector.
11. *Information Exchanges Between Competitors Under Competition Law-2010*, OECD Policy Roundtable Report (Jul. 11, 2011), http://www.oecd.org/competition (accessed Jan. 9, 2013), at 54.

may be used as starting points in competitive analyses,[12] it is difficult to elaborate general and theoretical rules to distinguish competitively harmful exchanges of information from pro-competitive exchanges. Therefore, such issues must be approached on a case-by-case basis. The economic context, in which the participants to the information exchange are active, cannot be ignored.[13]

This article focuses on information exchanges between competitors under China's Anti-Monopoly Law (AML), which has now been in effect close to five years. The AML takes the same approach as the EU in categorizing monopoly agreements into three forms: agreements of competitors, decisions of industry associations, and "concerted practices."[14] In the AML's implementing rules on monopoly agreements, both the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) set "intention communication" or "information exchange" as a necessary element to establish a concerted practice.[15] The general language of the AML and its two implementing rules, combined with the lack of separate guidelines, leave various questions to businesses or practitioners seeking to understand the legal consequences of information exchanges between competitors under the AML.[16]

For example, what is the implication of an "intention communication," and is it different from the term of "information exchange or sharing" used in other major jurisdictions? Is reciprocity in exchanging information necessary to establish a concerted practice? Furthermore, what kinds of information exchanges may create legal risks under the AML? For example, is an invitation to collude prohibited under the AML? And what factors may be considered in exempting a competitive information exchange from the AML's coverage?

Although a lot of questions remain to be answered, China's enforcement of the AML has not stagnated. In the last five years, China has gained valuable experience in dealing with information exchanges between competitors. The relevant cases include not only ones with the flavor of monopoly agreements, but a number of merger control cases, as well. Governmental and scholarly studies also are accumulating. Together, they cast a helpful light on how businesses and practitioners should evaluate information exchanges between competitors in China from the antitrust perspective.

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12. *Unilateral Disclosure of Information with Anticompetitive Effects-2012*, OECD Policy Roundtable Report, 11, http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf.
13. *Information Exchanges Between Competitors Under Competition Law-2010*, OECD Policy Roundtable Report (Jul. 11, 2011), http://www.oecd.org/competition (accessed Jan. 9, 2013), at 53.
14. *See* AML, Art. 13, and Art. 101(1) of the Treaty on the Functioning of the European Union.
15. Together with the Ministry of Commerce, which reviews pre-merger antitrust filings, NDRC and SAIC investigate monopoly agreements and abuse of dominance cases (NDRC handles price-related matters and SAIC non-pricing matters). *See* Anti-Price Monopoly Regulation, [2011] NDRC Order No. 7, Feb. 1, 2011, Art. 6 and Regulation on the Prohibition of Monopoly Agreement Conduct, [2010] SAIC Order No. 53, Dec. 31, 2010, Art. 3.
16. Chinese competition law professor Xiaoye Wang has noted that "many of the [AML] provisions are very general, lacking specificity, implementing regulations, and guidelines, which are essential for the law to be workable." Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 579, 583 (2009).

A word of caution is critical. It is necessary and crucial not only to carefully examine the words of the AML, but to read them in the context and light of China's history, culture and traditions.[17] Even though the AML incorporates many aspects of EU and American competition laws and principles, it ultimately serves a Chinese political-legal system that does not fully share "the same values of the Western legal traditions."[18] Chinese antitrust authorities must pay "attention to local specificities" and need to implement their market regulations "within the framework of a socialist political system...."[19]

It also is critical to keep in mind that "China is attempting to create a legal system that is unique."[20] Within China, "[i]ncreased commitment to the regularization that law brings exists side by side with a system that remains susceptible to popular demands and appeals to popular morality and local custom."[21] In the words of one well-known scholar, "[i]n an important sense, law in the European/North American tradition itself may be viewed as a belief system, which having been imported into China must operate in the context of local belief systems."[22] One, therefore, cannot possibly hope to fully understand or predict future competition policy decisions in China without recognizing that such decisions are likely to be influenced as much or more by China's unique culture and history, as by the influences of competition laws and decisions in the EU, the United States and other jurisdictions.[23] The culture and history of sharing competitive business information in China is discussed in Section §7.02 below.

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17. *See*, e.g., H. Stephen Harris, Jr. et al., *Anti-Monopoly Law and Practice in China* 5 (20[illegible] ("Those companies now doing business in China must now take measures to ensure [their] compliance policies address the unique aspects of the AML. Compliance with the AML is also challenging because of the breadth and vagueness of certain provisions of the AML, the so[illegible] limited transparency of court and agency decisions, and the absence to date of sufficient agency or court decisions or explications of the law's provisions in the form of rules, regulations, or guidelines").
18. Ignazio Castelluci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L. & COMP. L. [illegible] 64 (2007).
19. *Id.*, at 83–84.
20. Benjamin Liebman, *Assessing China's Legal Reforms*, 23 COLUM. J. ASIAN L. 17, 31 (2009).
21. *Id.*, at 32. Liebman adds that the distinctiveness of China's legal reforms "also comes from mixing foreign imports and increased adherence to rule of law values into a system that continues to embrace flexibility and populism as core principles of the legal system." *Id.*, at [illegible]
22. Pittman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI [illegible] 182 (Thomas Gold et al. eds. 2002).
23. *See*, e.g., H. Stephen Harris, Jr., et al., *Anti-Monopoly Law and Practice in China*, Maher M. Dabbah, *The Development of Sound Competition Law in China: An (Im)possible Dream?*, 30 WORLD COMPETITION 341, 354 (2007) ("[T]he adoption and development of competition law and policy in a particular country is very much related to and depends on the culture and type of economy of that country as well as on various socio-economic and socio-political circumstances prevailing in such country"); and Thomas R. Howell, et al., *China's New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL'Y J. 53, 54 (2009) ("In the absence of a global set of competition rules, prescribed by the WTO or otherwise, China "could not, even if it had so chosen, conform its competition policy to a single unitary system of multilateral norms. For China, divergence from at least some national competition regimes has been inescapable").

§7.02 THE HISTORY AND CULTURE OF COMPETITOR INFORMATION EXCHANGES IN CHINA

[A] The Impact of China's Guanxi Culture and Social Norms on Competitor Information Exchanges

The sharing of business information between competitors has a long history in China. In China, many businesses view their competitors as part of their guanxi network. The concept of guanxi runs deep throughout Chinese culture and history. Guanxi is a Chinese term that defies simple translations.[24] In general, however, guanxi refers to connections and relationships that are based implicitly "on mutual interest and benefit."[25]

"Guanxi has been a pervasive part of the Chinese business world for the last few centuries."[26] As described by Professor Yadong Luo:

> [guanxi] binds literally millions of Chinese firms into a social and business web. It is widely recognized that guanxi is a key determinant of business performance. It is the lifeblood of both the macro-economy and micro-business conduct. Any business in this society, including both local firms and foreign investors and marketers, inevitably faces guanxi dynamics. No company can go far unless it has extensive guanxi networks in this setting.[27]

Guanxi in China is "ubiquitous and plays a fundamental role in daily life."[28]

Chinese businesses and their managers cultivate extensive guanxi networks that include not only their suppliers and customers, but their competitors, as well. Professor Luo observes:

> Good relationships with managers at competitor firms facilitate possible inter-firm collaboration and implicit collusion, while minimizing uncertainties and surprises. Superior relations with competitors may also boost information flows and price harmonization among rivals, which in turn enhance their common benefits. Previous research found that the more uncertain the environment, the more likely these informal ties will be mobilized to facilitate inter-firm relationships. Overall, these ties with managers at other firms can be regarded as an opportunity set for inter-firm relationships, or as lubricant in exchange relations which serves to reduce transaction costs.[29]

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24 *See*, e.g., Micaela Tucker, *"Guanxi!"—"Gesundheit!" An Alternative View on the "Rule of Law" Panacea in China*, 35 VT. L. REV. 689, 693 (2011). Ms. Tucker notes that "[g]uanxi is variously translated or understood as connections, relationships, loyalty, ...a social network..., mutual understanding, [and] mutual respect...." *id.*

25 Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 70 (2006); *see also* Thomas Gold, Doug Guthrie & David Wank, *An Introduction to the Study of Guanxi*, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 3,6 (T. Gold, D. Guthrie & D. Wank eds., 2002); and MAYFAIR MEI-HUI YANG, GIFTS, FAVORS & BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA 1 (1994).

26 YADONG LUO, GUANXI AND BUSINESS 1 (2d ed. 2007).

27 *Id.*

28 *Id.*, at 2.

29 *Id.*, at 83 (citations omitted).

Guanxi relationships include personal commitments and mutual favor sharing over long periods of time. Guanxi is "personal, reciprocal, and more long-term oriented." On a broad scale, guanxi implicates questions of the rule of law in China.[31] To typical Western thinking, guanxi may at times seem antithetical to the rule of law. However, a harmonious integration of the two concepts is possible.[32] The challenge for China's enforcement agency is to recognize the cultural norms contained in guanxi while discouraging uses of guanxi that lead to anti-competitive information sharing and behavior.

[B] China's Social and Cultural Norms and Information Exchanges

Information exchanges can be seen as part of China's "social norms" that help maintain "a peaceful and harmonious society."[33] A strong culture of community and cooperation, as opposed to individualism and competition, undergirds China's social norms. The community of common interests generally prevails over individual interests.[34] Whereas current American antitrust doctrine tends to lionize and encourage aggressive and even cutthroat competition, the AML pointedly asserts that an important goal is to implement competition rules compatible with the socialist economy, and to ensure an orderly market system.[35] Protecting consumer welfare and the public interest and "promoting the healthy development of the socialist market economy" are paramount and explicitly stated objectives.[36]

A major concern for Chinese competition policymakers has been the potential for "excessive" or "malignant" competition.[37] Reacting to widespread fears, China's government encourages "industry self-discipline" under its supervision to help rein in "excessive competition."[38] The Chinese government's "supervisory role in maintaining industry 'self-discipline' is a prime example of the substantial gap between Western

30. Fang Yang, *The Importance of Guanxi to Multinational Companies in China*, 7, ASIAN SOC. 63–64 (2011).
31. Thomas W. Dunfee & Danielle E. Warren, *Is Guanxi Ethical? A Normative View of Doing Business in China*, 32 J. BUS. ETHICS 191, 193 (2001).
32. Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN LAW 1, 73–74 (2006).
33. June Zhao & Ming Hu, *A Competitive Study of the Legal Education System in the United States and China and the Reform of Legal Education in China*, 35 SUFFOLK TRANSNAT'L L. REV. 329, 3[illegible] (2012).
34. *See*, e.g., Ignazio Castelluci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L COMP. L. 35, 64 (2007). ("A 'socialist' rule of law still implies...the prevalence of common interest over individual ones, and other fundamental values making China's popular democracy and Western liberal democracies two different things").
35. AML, Art. 4.
36. AML, Art. 1.
37. *See* Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 247 (2008) (observing that "fear of 'excessive competition' is widespread in China").
38. *See*, e.g., *id.*, at 248–249 ("To many, China's problem is not that there is too little competition but that there is too much").

and Chinese expectations" in the context of coordination and competitive information exchanges among industry participants.[39]

China also has shown a keen long-term interest in protecting the long-term health and stability of smaller competitors, as part of its interest in an orderly market and industry self-discipline." Indeed, Article 15(1)(3) of the AML expressly exempts monopolistic agreements that aim to "enhance competitiveness of small and medium-sized enterprises."[40] Thus, information exchanges in China between competitors that are designed or can be shown to enhance the competitiveness of small and medium-sized enterprises, which might receive harsh treatment in the EU or the United States, are likely to be positively received and reviewed in China.

Along with promoting a stable and orderly market, Chinese culture and regulators have long been concerned with competitive fairness.[41] At least one Chinese scholar has described "an infatuation, common in Asia, with 'fairness.'"[42] In a 2008 government white paper, China's State Council Information Office observed that one of the key goals of China's legal reforms is promoting and enhancing "fairness and justice," and maintaining "social harmony and stability."[43]

Although such concerns trouble some conservative competition scholars,[44] they indicate that Chinese regulators may view favorably information exchanges that are designed or can be shown to increase competitive fairness.

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39. H. Stephen Harris, Jr., et al., *Anti-Monopoly Law and Practice in China* 203 (2011).
40. Many conservative American competition scholars are troubled by China's concern for small and medium-sized business undertakings. *See,* e.g., H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169–192 (2006); *see also* Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 251 (2008) ("Competition itself should always be welcomed, especially when it is not good for competitors"). Recently, however, progressive American antitrust scholars have posited theories more in line with China's. *See,* e.g., Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615 (2012).
41. *See,* e.g., Lawrence S. Liu, *All About Fair?—Competition Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259, 298 (2012) (observing that Chinese enforcement officials have been "deeply concerned with issues like 'fairness' and 'disturbing market order'"). Although for "many American jurists and scholars the notion that antitrust and competition law should incorporate moral norms of fairness is anathema," at least one progressive American antitrust scholar has recommended that American courts and regulators begin paying closer attention to evolutionary norms of fairness in competition analyses. *See,* e.g., Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. (forthcoming 2013), http://works.bepress.com/thomas_horton/3.
42. *See,* e.g., Lawrence S. Liu, *All About Fair?—Competition Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 259 (2012).
43. The State Council Information Office, China, *China's Efforts and Achievements in Promoting the Rule of Law*, reprinted in 7 CHINESE J. INT'L LAW 513, 514 (2008).
44. *See,* e.g., Lawrence S. Liu, *All About Fair?—Competition Law in Taiwan and East Asian Economic Development*, 57 ANTITRUST BULL. 301 (2012) ("Lack of strong political commitment to robust competition laws, while clinging to fuzzy notions of fairness, can reduce the predictability of Asian competition law enforcement").

[C] Trade Associations and Competitor Information Exchanges

Trade and business associations have a long history in China. During the period between 1978 and 1984, when China began implementing its reform and opening-up policy, the enterprise reform with the characteristics of expanding enterprise autonomy deepened. Following the experience of foreign countries and regions, China established two trade associations in 1980, and thereafter more and more trade associations came into being.[45]

"In China, trade or industry associations can include "any social corporate entity established by companies in the same industry for the benefit of its members."[46] Although Chinese trade associations are not actual governmental bodies, they work closely with the government to help maintain "industry self-discipline" and to avoid "excessive competition."[47] Many Chinese trade association officials are former government ministry officials who view an important part of their mission as carrying out governmental policies and initiatives.[48] An unwritten policy recognizes that the value of a Chinese trade association in maintaining competitive fairness and a stable and orderly market "depends on mutual help rendered, good prices offered, provision of tips and other news, and credibility."[49]

Recognizing the dangers of Chinese trade associations serving as enablers of illegal cartels, "[m]any members of the Standing Committee of the 10th National People's Congress expressed their concerns and requested that the AML explicitly prohibit industry associations from undertaking anticompetitive conduct."[50] Reacting to such concerns, Article 16 of the AML provides: "Industry associations shall not organize for the business operators in their industry to engage in a monopolistic conduct prohibited under this chapter." However, Article 11 of the AML expressly provides that "industry associations shall strengthen self-discipline to guide business

45. *Industry Association, a number of legal issues* (Maju Fang ed. 4/7/10), China Paper Download Center, http://law.chinaassn.com/article.aspx?id=33357 (accessed Jan. 9, 2013).
46. H. Stephen Harris, Jr., et al., *Anti-Monopoly Law and Practice in China* 200 (2011).
47. *See id.*, at 201–202. *See also* Mark Williams, *Foreign Investment in China: Will the Anti-Monopoly Law Be a Barrier or a Facilitator?* 45 TEXAS INT'L L.J. 127, 137–138 (2009) ("industry associations in China are generally established by the state, with the government playing a leading role in many of them. They are not independent producer associations as is common in Western developed economies"); and MARK FURSE, ANTITRUST LAW IN CHINA, KOREA, AND VIETNAM 82 (Oxford U. Press 2009) ("It is generally the case that trade associations are viewed favorably within commercial circles in China and are seen as an important mechanism for industrial progress").
48. H. Stephen Harris, Jr., et al., *Anti-Monopoly Law and Practice in China* 202 (2011); n. 108.
49. *See id.*, at 15. Indeed, it is generally believed that good relationships between managers of competitive firms "are likely to boost" the overall market performance of the member firms. *id.*, at 83.
50. Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 602 (2009). Dr Wang further points out that Article 16 of the AML "was added by amendment during the AML third review by the Standing Committee of the 10th NPC in August 2007, which was the outcome of public outrage at a widely reported collective price increase by instant noodle producers. The price increase was initiated and organized by Instant Noodle China Association from the end of 2006 through early July 2007." *Id.*, at 602.

operators in the relevant industries to conduct competition in accordance with the law and to safeguard the order of market competition."[51] The AML thus seeks to strike a delicate balance in trade association activities between promoting stable and fair competition and anti-competitive conduct.

In practice, Chinese businesses', trade associations', and managers' awareness of the AML remains to be greatly enhanced. For example, several Chinese trade associations' charters still list coordinating prices as one of their primary objectives and functionalities.[52] Taiwan, which got its Fair Trade Law in 1991, 16 years earlier than Mainland China, faces similar circumstances. Indeed, in the latest LCD cartel case heard by a United States court, two managers of the Taiwanese company AU Optronics, who led an antitrust conspiracy and received three-year imprisonment sentences, did not believe that their activities were for their personal sakes. Rather, they believed that they were helping to rescue the industry from a price plunge caused by excessive production.[53] Chinese competition scholars Yong Huang and Zhe Zhang have observed:

> With their structure and mechanisms as well as sources of funding and senior management, some Chinese industrial associations simply feel it is their duty to fix a 'good' price on behalf of their members. This mindset was actually inherited from their unique role during the history of China's economic transformation. Consequently, we frequently witness some stupid announcement of price increasing or minimum price maintenance by different industrial associations, from instant noodle manufacturers to real estate developers. Sometimes, the industrial associations do not even realize the illegality of their behavior.[54]

As noted by the Director General of SAIC's Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau in the first China Competition Policy Forum held in early December 2012 by the expert consultation group advising the Anti-Monopoly Commission, of the 17 cases that had been investigated by SAIC since the AML went into

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"This provision was inserted to the [AML] law very late, during NPC's second reading. It reflects the Chinese government's view that industry associations have a positive role to play in enhancing the export competitiveness of domestic industries and regulating perceived 'excessive' competition in the Chinese market." H. Stephen Harris, Jr., et al. *Anti-Monopoly Law and Practice in China* 204 (2011). *See also* Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117, 129–130 (2008) ("With respect to trade associations, Chinese legislators are hoping that these organizations can play an important role in enhancing the competitiveness of domestic industries. In particular, the lawmakers want the trade associations to eliminate 'vicious competition,' or cutthroat price wars").

For example, Shandong Software Industry Association (http://www.sdsoft.org.cn/news_read.asp?id=356); Shanghai Real Estate Trade Association (http://www.srea.org.cn/lb_show_66.html); Shanghai Convention and Exhibition Industries Association (http://www.sceia.com.cn/subpage/introduce.asp?newsid=3); and Shanghai Die & Mould Trade Association (http://www.sdmta.com/ArticlesOfAssociation.asp).

AU Optronics gets $500m for LCD prices manipulation and two senior executives get imprisonment, http://it.sohu.com/20120921/n353656267.shtml (accessed Jan. 17, 2013).

Yong Huang & Zhe Zhang, *Study on Frontier Issues and the Future Road of Regulation Over Monopoly Agreements in China*, in COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE US AND EUROPE 45, 50 (M. Faure & Z. Zhang eds., 2011).

effect in 2008, trade associations were involved in a majority of the 16 monopoly agreement cases.[55]

Given the straightforward and blunt language of Article 16 of the AML, it seems reasonable to assume that the Chinese regulatory authorities will keep a close eye on and pay special attention to Chinese trade association activities—especially as they relate to potential price and output coordination. In Section §7.03, we will examine the kinds of information exchanges that may be deemed potentially harmful to competition.

§7.03 ANALYZING COMPETITOR INFORMATION EXCHANGES UNDER THE ANTI-MONOPOLY LAW

[A] China's Statute on Information Exchanges

As discussed above, like EU competition law, the AML broadly defines monopoly agreement as an "agreement, decision or other concerted practice which eliminates or restricts competition" while also spelling out a series of particular acts that may have anti-competitive consequences. As discussed in Section §7.01 above, NDRC and SAIC in their roles as the AML implementing authorities, have separately promulgated rules. According to these two sets of rules, concerted practices mean that even though the enterprises in question may not have reached explicit agreements or decisions orally or in writing, they may still have effectively coordinated their competitive behavior. In analyzing potential concerted practices, the authorities must consider three elements:

- whether the market conduct of the competing enterprises was identical;
- whether the enterprises communicated their intentions or exchanged information; and
- the relevant market structure, competitive status, market change, industry situation, etc., whether the enterprises are able to provide reasonable explanations other than collusion, which could justify their identical conduct.[56]

55. Ren Airong (Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce), *Some trade associations play negative role*, http://tom.legal.people.com.cn/n/2012/1204/c188502-19792125.html (accessed Jan. 2013).

56. Both NDRC and SAIC attempted to clarify the elements to establish "concerted practice," but their rules do not fully overlap. Both rules identify competitors' identical market behavior and their prior communication of intentions as two essential elements. However, compared with the NDRC rules, the SAIC rules further propose to examine whether the competitors have exchanged information (in addition to intentions), and whether they can provide reasonable explanations other than collusion for their identical behavior. In a recent seminar, officials from the two agencies noted that these legislative differences are not material, and in practice they will adopt essentially the same elements to find concerted practices. Therefore, this article examines the elements provided by the rules of the two agencies comprehensively, rather than separately.

This implies a rule of reason analysis approach on a case-by-case basis, which is no different from other jurisdictions.[57] However, as discussed above, a number of questions need to be answered on how to apply the rules in practice by looking at real cases and legal studies. Section §7.03[B] will introduce several relevant recent cases in China. Applying these cases and additional legal studies, Section §7.03[C] discusses their possible relevance to analyses of competitor information exchanges under the AML.

[B] Recent Cases in China Concerning Competitive Information Exchanges

[1] Unilever Case

Since the AML took effect, Chinese antitrust authorities have not found any concerted practices to be express violations of the AML. Nevertheless, the *Unilever* case, which was determined by NDRC based on the Price Law, raised a question concerning what information exchanges may be detrimental to market competition, and how to appropriately regulate such behavior under the pre-existing legal framework or the new framework under the AML.

In March 2011, Unilever China sent letters to supermarkets throughout China announcing price increases for some household consumer products, which were to take effect on April 1, 2011. According to NDRC, beginning on March 21, 2011, a Unilever China spokesman gave several public interviews and released the following statements to the domestic press:[58]

- "The everyday chemicals industry is sufficiently competitive, with a great number of brands. Consumers are relatively price-sensitive and competitors are monitoring each other. One can only make slight adjustments and see whether rivals follow suit."
- "The industry of fast moving consumer goods is a downstream industry. Judging from the current upstream and downstream chain reaction, the whole industry has entered a price rise cycle."
- "Price rises involve a wait-and-see process and everybody is waiting for the first one to adjust prices…If our rivals do not follow suit, then we will surely suffer. Therefore, we can only make gradual adjustments to product prices…If the prices of raw materials rise further and remain stable in the near future, the possibility of a second round of price rises will not be excluded."

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57 *Information Exchanges Between Competitors Under Competition Law-2010*, OECD Policy Roundtable Report (Jul. 11, 2011), http://www.oecd.org/competition (accessed Jan. 9, 2013), at 53.

58 *The National Development and Reform Commission answers journalists' questions regarding its prosecution on Unilever China disseminating price rise information and disturbing the market order*, http://jjs.ndrc.gov.cn/gzdt/t20110506_410562.htm (accessed Jan. 17, 2013).

- "The degree of price rises in April is not clear now. The prices of ... materials are rising now and product prices will surely rise in the futur...
- "[T]he prices of upstream raw materials such as petrochemicals, vegeta... oil and inorganic chemical products rose by an average of around 40... which has directly led to an around 20% increase in the production cos... daily chemicals...Actually, the gross profits of some categories of da... chemicals are not high; for example, the gross profit of washing powde... around 10%. Some small enterprises have long been hard to survive, ... they dare not raise prices while big companies do not raise prices."

NDRC found that these statements, which were widely reported by the press, drove ... Chinese consumers' expectations of price increases, and caused a panic buying ... products in some cities. Sales of some products sharply rose by dozens of times, ... even by as much as around 100 times in some supermarkets. Also according to NDR... while Unilever decided to adjust prices as of April 1, other major daily chemic... suppliers such as Liby and Nice also decided to make price adjustments as of Apri... and April 6. With the wish to stop panic buying and also curb inflation, which wa... significant challenge for the Chinese government at that time, NDRC had meetings wi... the suppliers, and asked them to suspend their price increases for the moment. ... price rise was then temporarily calmed down.

NDRC found Unilever to have disseminated price rise information and distur... the market pricing order, and imposed a fine of RMB 2 million. Although the legal bas... NDRC relied on in imposing a fine on Unilever was the Price Law, the Q&A posted ... NDRC on its website mentioned the AML as one of the laws business operators shou... abide by. Article 14 of the Price Law prohibits business operators from "fabricating ... disseminating information on price rises, driving up prices, and promoting excessiv... rises of product prices." NDRC emphasized that:

> In the market competition, business operators worry about losing market share ... and therefore are very cautious about raising prices. By way of announcing price ... rises etc. in advance in a high-profile manner and through focused media reports, ... competitors test market reaction and hope that competitors follow the price rise. It ... gave the competitors in the industry some time to reciprocally coordinate price ... strategies to achieve a coordinated price behavior. While the market shares remain ... unchanged, a collective industry price rise is implemented.[59]

In the accompanying Q&A, NDRC reminded all business operators, especially th... with relatively high market shares and relatively great impact in the industry, no... "announce price rise information, with bad intentions, to test market reactions or rai... prices collectively with competitors by tacit collusion...."

Based on NDRC's public pronouncements, we can potentially infer that beyon... the unilateral announcements of Unilever of the price rise information, NDRC migh... have been considering a case against Unilever, Liby and Nice under the AML, allegin... that the companies communicated their intentions to raise prices through the pri...

59. *Id.*

and tacitly colluded through price signaling. The *Unilever* case serves as a strong warning to businesses operating in China to pay close and special heed to the AML and the new and developing rules in China concerning competitive information exchanges.

[2] *MOFCOM Divestiture Orders*

The Ministry of Commerce (MOFCOM) is responsible for merger enforcement in China.[60] In carrying out its enforcement duties, MOFCOM has published several decisions that briefly discuss the issue of information exchanges between competitors.

First, in Mitsubishi Rayon's acquisition of Lucite International, MOFCOM required specific divestitures in approving the merger and required the MMA monomer business of Lucite China and Mitsubishi Rayon in the Chinese market to be "run separately and independently by a separate team of management and board of directors."[61] MOFCOM further required that "during the period of independent operations, the parties shall each continue to sell MMA in China independently on a competitive basis, and no information about pricing, customer, or any other competitively sensitive information related to the Chinese market shall be exchanged between the parties."

Similarly, in connection with the acquisition by General Motors of car parts supplier manufacturer Delphi, MOFCOM imposed a number of conditions on its approval of the transaction designed to prevent discrimination by General Motor/Delphi against its competitors. In terms of competitive information exchanges, MOFCOM required that:

> Post-closing, General Motors commits not to illegally seek to obtain any competitively sensitive confidential information in the possession of Delphi relating to other domestic vehicle manufacturers, while Delphi commits not to illegally disclose any competitively sensitive confidential information in the possession of Delphi relating to other domestic vehicle manufacturers. The parties to the concentration are committed not to illegally exchange or communicate with each other any competitively sensitive confidential information of a third party whether by formal or informal means.[62]

In connection with Panasonic's acquisition of Sanyo, MOFCOM required Panasonic to divest Sanyo's lithium coin-cell secondary business in Japan. MOFCOM further required that:

> Between the date of the merger and completion of the divestiture, Panasonic and Sanyo should conduct related business independently and shall not disclose to each other any competitive information such as prices and buyer information except for the disclosures pursuant to legal requirements or obligations.[63]

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[60] The Chinese merger control scheme is set forth in Chapter 4 of the AML.

[61] *Mitsubishi Rayon/Lucite International*, [2009] MOFCOM Public Announcement No. 28, Apr. 24, 2009, sec. 7(2).

[62] *General Motors/Delphi*, [2009] MOFCOM Public Announcement No. 76, Sep. 28, 2009, sec. 7(2).

[63] *Panasonic/Sony*, [2009] MOFCOM Public Announcement No. 82, Oct. 30, 2009, sec. 6(1)(3).

Finally, in its conditional approval determination on Seagate's acquisition o sung's hard disk drive business, among others, MOFCOM imposed a condition th target business should be operated independently from Seagate for a period of a one year. One of the key measures for that purpose was to keep Samsung's tea pricing and sales completely independent and set up a firewall between Sams team and Seagate's team to avoid mutual exchanges of competitive information, w included any information that might lead to competitors coordinating business o tion activities, especially information on product price, output, customers, bid etc.[64] MOFCOM used similar language in its 2012 conditional approval of the W Digital acquisition of the Hitachi hard disk drive business. MOFCOM required W Digital and the Hitachi business to "establish a firewall [to] ensure that the two sid not exchange competitive information."[65] Competitive information was classifi "anything that might lead to coordinate the conduct of operations with other...especially on product cost, price, production, customers, [and] bid info tion."[66]

These MOFCOM decisions provide helpful insights into the types of compe business information exchanges that may potentially contravene Article 13 of the As seen, pricing and customer information are considered especially sensitive exchanges of such information must therefore be carefully justified, planned monitored.

[C] Predicting Potential Chinese Rules on Competitive Information Exchanges from the Relevant Cases and Legal Studies

[1] What are "Communicated Intentions"?

As discussed above, the issue of whether business competitors have "commun intentions" by exchanging sensitive business information is likely to be paramou China in any potential future enforcement of the AML. Although the NDRC and implementing rules both include "communicating intentions" as a key fact consider, neither has yet offered material guidance as to what is meant by the ter issue becomes even more confusing when one considers that the Chinese translati "communicating intentions" includes Chinese cultural and historical characteri

Potentially, some analogies can be drawn from Chinese tort and criminal treatment of "communicated intentions." In Chinese torts law, "intention com cation" means that the joint infringers reached a common decision and consc worked with each other in causing injury.[67] In the Criminal Law, "intention co nication" is interpreted as joint offenders communicating their intent and liais

64. *Seagate/Samsung*, [2011] MOFCOM Public Announcement No. 90, Dec. 12, 2011, sec
65. *Western Digital/Hitachi* [2012] MOFCOM Public Announcement No. 9, Mar. 2, 2012, s
66. *Id.*
67. Xiao Cheng, *Implication of the Joint Conduct in Art. 8 of Tort Liability Law*, TSINGHU (2010). Article 8 of the Tort Liability Law stipulates: "Where two or more persons commit a tort, causing harm to another person, they shall be liable jointly and severa

with each other, so that they realize that they are not committing a crime in isolation, but together with others.[68] The key point is that no matter how the relevant parties communicate, they must clearly understand that they are effectively working together.

This kind of interpretation of the "concerted practices" concept would seem to be endorsed by the National People's Congress. In a book published by the Economic Law Division of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, "other concerted practices" is interpreted to mean that even though no written or oral agreement or decision was reached between the enterprises, they still communicated with each other in a tacit way that enabled them to coordinate their activities, so as to restrict or eliminate competition.[69] Also, as stated by an article published by a project team of a training program for professionals in antitrust and anti-unfair competition law enforcement, other concerted practices always exist in the form of tacit collusion and are consistent behaviors conducted by enterprises, relying on tacit understanding between each other, in same time periods and same markets.[70]

Such guidance echoes the EU guidelines, which state that to establish a concerted practice by information exchange, the regulators must show that "practical cooperation between them [competitors] is knowingly substituted for the risks of competition."[71] In other words, competitors in a concerted practice should be found to have been aware that others are following the same course with them, rather than independently competing with each other.

The *Unilever* case discussed above shows that the authorities' most challenging mission is to establish that the relevant enterprises knew they were carrying out the same market behavior (e.g., raising the price to a similar degree). Indeed, the *Unilever* decision was adopted under a provision of the Price Law, which applies to conduct by a single company, instead of the AML.

By reference, Taiwan's treatment of the term "intention communication" may also be instructive. Article 5 of the Taiwanese Fair Trade Law (as revised on August 30, 1999) provides that a consensus reached in other ways under Article 7 of the law includes intention communications other than covenants and agreements, which could cause joint conduct even if they are not legally binding. Following this law, in 2004, the Taiwanese Fair Trade Commission determined that PetroChina and Formosa engaged in coordinated anti-competitive behavior through 20 announcements of price list adjustments. The Fair Trade Commission ruled that the announcements were used

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68 MINGKAI ZHANG, STUDIES ON CRIMINAL LAW (Law Press China 1997). Art. 25 of the Criminal Law states as follows: "A joint crime means an intentional crime committed jointly by two or more persons ..."

69 The Economic Law Division of the Legislative Affairs Commission of the Standing Committee of the People's National Congress, *Articles Explanation, Legislative Reason, and Relevant Provision of the Anti-Monopoly Law of the PRC* (Peking U. Press 2007).

70 No. 2 project team of the training program for professionals in antitrust and anti-unfair competition law enforcement, *Determination and Prosecuting of other Concerted Practices under China's Anti-Monopoly Law*, http://www.saic.gov.cn/gsld/gztt/xxb/201108/t20110810_112804.html (accessed Jan. 16, 2013).

71 Guidelines on the Applicability of Art. 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, OJ [2011] C 11/1, para. 60.

to coordinate price increases that affected the market's supply and demand bala The two companies were fined 6.5 million new Taiwan dollars.[72] As with the *Uni* matter, in this case, reading from the Taiwanese authority's determination, inte communication was carried out through the announcement of pricing adjustme

Turning back to Mainland China, in terms of the plain meaning of the regul rules, "exchanging information" necessarily would appear to be much broader in sc than "communicating intentions," since competitive business information can inclu both pure facts (such as rising costs) and intentions (such as plans to raise prices particular date). The precise issues of the types and scope of information that m ultimately lead the authorities to conclude that a "communicated intention" h occurred remain to be clarified by future law enforcement actions and decisions potential clearer statutory and regulatory guidance. However, as read from the case information and legal studies, the use of different legal terms does not mean the law enforcement standard is different. No matter what kind of information has b exchanged, the key element to establish a concerted practice is a finding competition has been adversely impacted through knowing coordination rather independent decision-making.

[2] Do Information Exchanges Need to Be Reciprocal?

Another substantial question in analyzing competitor information exchange whether the information needs to be reciprocally communicated to find a concer practice? A concerted practice is a type of monopoly agreement that implies existence of reciprocal contacts. But do reciprocal contacts exist if the receiver o information stays silent and does not respond to the competitor who initially sen information, but then adjusts its behavior and follows the initiator?

On this question, the 2012 OECD Policy Roundtable Report on Unila Disclosure of Information with Anti-competitive Effects has given a clear answ emphatically states, "[f]or purpose of establishing a collusive arrangement i irrelevant whether only one firm unilaterally informs its competitors of its inte market behavior, or whether all participating firms inform each other of their re tive deliberations and intentions."[73] To further clarify this issue, the 2012 OECD Re continues in saying that:

> When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and

72. Taiwanese Fair Trade Commission Bulletin, Vol. 13, Issue 11, at 934. The case led to debates. The Taiwanese Fair Trade Commission believed that the announcements were to test each other's reactions. If one followed the other, they would adjust their identically and simultaneously. If the other did not follow, the price announcement wou withdrawn. Some critics asserted that the behaviors were no more than conscious paral which should not have been regulated. *See* Xianming Lian & Jitian Xu, TAIWAN ECON School of Economics of National Taiwan Univ. 36:3 (2008) at 395.

73. *Unilateral Disclosure of Information with Anticompetitive Effects-2012*, OECD Roundtable Report, 11, http://www.oecd.org/daf/competition/Unilateraldisclosureofinf ation2012.pdf, at 13.

> adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data. Simple acquiescence can be considered as acceptance of the information received.[74]

The OECD approach is the same as that taken by the EU. The EU guidelines contain similar policy statements:

> A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behavior, or whether all participating undertakings inform each other of the respective deliberations and intentions... When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.[75]

This approach of not requiring reciprocal strategy disclosures appears stringent because as discussed above, reciprocity should be inherent for any kind of "agreement." But the 2012 OECD Roundtable Policy Report explains the underlying reasoning:

> It is for this reason that particularly in the context of private exchanges (e.g. a price announcement made by a competitor during a meeting of the trade association), courts have considered it necessary that participants to the meeting had to publicly distance themselves from the discussion in order to escape liability.[76]

This stringent approach ultimately provides a stern warning to help guide businesses analyzing potential competitive information exchanges. If and when a competitor receives sensitive competitive business information, it should take active measures to express an attitude that it does not want to get involved in any potential concerted practices, so that the strategic uncertainties and independent competition in the market are maintained.

As discussed above, "intention communication" in Chinese law implies that competitors are knowingly working with each other in undertaking a specific strategic market behavior. But if the information receiver does not respond to the information sender in any way (e.g., by reacting with their own public announcement of price adjustments, as discussed in the *Unilever* and *PetroChina/Formosa* cases), it may be difficult to establish that the competitors were aware that they were not acting in isolation. Due to the lack of relevant precedents in China, how China will look at this issue remains to be clarified by specific official guidance or enforcement activities. In

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74 *Id.*, at 13.

75 The Economic Law Division of the Legislative Affairs Commission of the Standing Committee of the People's National Congress, *Articles Explanation, Legislative Reason, and Relevant Provision of the Anti-Monopoly Law of the PRC* (Peking U. Press 2007), at sec. 62.

76 *Unilateral Disclosure of Information with Anticompetitive Effects-2012*, OECD Policy Roundtable Report, 11, http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf, at 47.

the meantime, businesses that receive potentially compromising information from competitor should strongly consider documenting and communicating their ow intentions to continue competing independently.

[3] Will Invitations to Collude Be Prohibited under the AML?

The OECD 2012 Roundtable Policy Report states:

> In the context of invitations to collude, competition authorities have also looked at the competitors' reaction to the invitation and have construed as acceptance of the invitation any specific market conduct which is in line with the offer to collude. For example, reacting to an invitation to raise prices by raising its own prices would be taken as a form of acceptance, unless it can be shown that the price increase was contemplated before the invitation was extended. Similarly, as discussed above, not reacting to the perceived invitation with a clear statement taking distance from it could be taken as a sign that the target of the invitation has the intention to accept it.[77]

Even if competitors receiving an invitation to collude react by not cooperating at all a continuing to compete, the party that sent the invitation potentially could be pr ecuted. As an example from the United States, on June 9, 2010, U-Haul Internation Inc. and its parent company settled Federal Trade Commission (FTC) charges that th violated Section 5 of the FTC Act by inviting U-Haul's closest competitor, Avis Bud Group, Inc., to collude on the prices for truck rentals. The FTC alleged that, on seve occasions between 2006 and 2008, U-Haul tried to increase rates for one-way tr rentals by privately and publicly communicating with Budget, the second-largest tr rental company in the United States. The invitations were sent indirectly via relev dealers or through a conference call with industry analysts. However, Budget did accept U-Haul's invitation, so competition was never actually chilled.[78]

Nevertheless, the FTC alleged an unfair method of competition in violation Section 5 of the FTC Act even though the actions did not violate the Sherman Act the Statement of then FTC Chairman Leibowitz, Commissioner Kovacic and Comm sioner Rosch explained: "[i]n contrast to conspiracy claims that would violate sec 1 of the Sherman Act, invitations to collude do not require proof of an agreement, a do they require proof of an anticompetitive effect."[79]

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77. *Id.*, at 13.
78. *See* Jun. 9, 2010 FTC Press Release, *U-Haul and Its Parent Company Settle FTC Charges They Invited Competitors to Fix Prices on Truck Rentals*, http://www.ftc.gov/opa/2010/ uhaul.shtm; *see also* Larry Fullerton, *FTC Challenges "Invitations to Collude,"* 25 ANTITRUS (Spring 2011).
79. Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch I Matter of U-Haul Int'l, Inc. and AMERCO, FTC File No. 081.0157, Jun. 9, 2010, htt www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf. *See also* Complaint, U Int'l, FTC File No. 081.0157 (Jul. 14, 2010), http:/www.ftc.gov/os/caselist/0810 100720uhaulcmpt.pdf; Decision & Order, U-Haul Int'l, FTC File No. 081.0157 (Jul. 14, 2 http://www.ftc.gov/os/caselist/0810157/100720uhauldo.pdf; and Analysis of Agree Containing Consent order to Aid Public Comment, U-Haul Int'l, 75 Fed. Reg. 35,033 (Jun 2010), http://www.ftc.gov/os/caselist/0810157/100609uhaulanal.pdf.

In November 2011, Australia provided a similar example in passing its Competition and Consumer Amendment Act (No. 1) 2011, which went into effect on June 6, 2012. This act prohibits anti-competitive price signaling and other information disclosures in the banking sector.[80]

By Chinese New Year 2013, China had no specific rules on invitations to collude, and the Anti-Unfair Competition Law seems to have little room to be applied to this kind of behavior (except for Article 2, which is a general article articulating the principle of "voluntary, equal, fair and good faith" in market activities). Therefore, it remains to be seen how China will deal with invitations to collude from the competition law perspective, especially given that the Anti-Unfair Competition Law is being revised.[81] It should be kept in mind, however, that in the Q&A issued by NDRC in the *Unilever* case, NDRC clearly stated that enterprises should not release price adjustment plans to test the reactions of their competitors. Consequently, it seems possible that China might well follow the United States and Australia in taking a harsh view of express invitations to collude.

[4] *What Kinds of Competitive Information Exchanges May Potentially Create Legal Risks?*

Similar to the United States, the EU and the OECD, Chinese authorities are struggling to find the appropriate competitive balance in permitting competitors to exchange business information. While future cases will be examined on a case-by-case basis, it is possible to identify potential factors that are likely to be important in considering whether a particular sharing of competitive information is likely to restrict competition.

Neither the NDRC rules nor the SAIC rules set forth the specific factors to be considered in analyzing whether a concerted practice would result from a competitive information exchange. Nevertheless, an article published by a project team of a training program for professionals in antitrust and anti-unfair competition law enforcement states that when analyzing whether information exchange of a trade association is legal, various factors including the characteristics of the information exchange should be examined.[82]

First, from the various divestiture orders of MOFCOM, it can be seen that product prices, as well as customer, output and bidding information are all sensitive business information which businesses should be careful in disclosing to competitors. As an example, in the announcements of the *Unilever* case, NDRC elaborated on the information disclosed by Unilever, including the rate by which its price would be raised, the detailed cost increases in upstream raw materials, and the gross profit of

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[80] See http://www.australiancompetitionlaw.org/legislation/2011pricesignalling.html.

[81] *Workshop on revising the Anti-Unfair Competition Law held*, http://www.saic.gov.cn/fldyfbzdjz/tpbd/201007/t20100727_93544.html (accessed Jan. 17, 2013).

[82] No. 2 project team of the training program for professionals in antitrust and anti-unfair competition law enforcement, *Determination and Prosecuting of Monopolistic Conduct of Trade Associations*, http://www.saic.gov.cn/gsld/llyj/xxb/201208/t20120822_128814.html (accessed Feb. 15, 2013).

washing power. NDRC's highlighting such competitively sensitive information implies that the disclosure of such information was strongly considered in analyzing the case.

NDRC also highlighted that Unilever had expressly referenced its competitors and included competitively strategic information that appeared unnecessary in an announcement ostensibly targeted at customers. Such offending statements included:

- "Competitors are monitoring each other and one can only make slight adjustments and see whether rivals follow suit."
- "Price rises involve a wait-and-see process and everybody is waiting for the first one to adjust prices...If our rivals do not follow suit, then we will surely suffer."
- "Some small enterprises have long been hard to survive, but they dare not raise prices while big companies do not raise prices."

It seems safe to conclude that trying to hide subtle (or not-so-subtle) messages to competitors in public announcements is a risky strategy at best.

Furthermore, NRDC's pronouncements appear to be consistent with the OECD's observation that public announcements can also be construed as invitations to collude, depending on how the communication is formulated. This would generally be the case of announcements which

- contain not only information which must, as a matter of commercial policy, be conveyed to customers, but additional information which is not intended for that audience (such as references to specific competitors);
- disclose more information than is strictly necessary for the purpose of the announcement; and
- make the behavior announced contingent on what other market players in the industry at large will do.[83]

[D] Potential Regulatory Exemptions for Competitive Information Exchanges

Article 15 of the AML generously sets forth numerous specific exemptions "from the application of Articles 13 and 14." Some of these exceptions are discussed below.

[1] Specific Article 15 Exemptions

Global competition regulators and authorities increasingly have come to recognize the potential pro-competitive synergies of joint competitor research and technology development (R&D) activities. As a result, joint R&D collaborations generally are viewed today as innovation and output enhancing, as long as they are carefully tailored

83. *Unilateral Disclosure of Information with Anticompetitive Effects-2012*, OECD Policy Roundtable Report, 11, http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf., at 42.

avoid potential anti-competitive ancillary agreements. "Research joint ventures often provide procompetitive benefits, such as sharing the substantial economic risks involved in R&D, increasing economics of scale in R&D beyond what individual firms could realize, pooling important R&D information or complementary skills, and overcoming the free-rider disincentive to invest in R&D by including likely R&D end users in undertaking the research efforts and sharing the costs."[84] As a result, in the United States "[m]ost such agreements are procompetitive, and they typically are analyzed under the rule of reason."[85]

Following the leads of the United States and the EU, China has adopted a hybrid approach to permitting and encouraging joint R&D collaborations. Article 15(1)(1) AML expressly states that activities proven to fall under the case of "improving technology, or researching and developing new products" shall be exempt from the application of Articles 13 and 14. Once again, however, it is critical to keep in mind that the joint R&D exemption is not absolute. Therefore, companies should keep close track of their joint R&D activities and objectives, and strictly limit any joint information sharing to what is necessary to further the R&D goals.

Similarly, Article 15(1)(2) exempts agreements proven to be undertaken for improving product quality, reducing costs, enhancing efficiency, harmonizing product specifications and standards, or dividing work based on specialization." These specific regulatory exemptions create huge opportunities for broad information sharing that is expressly and absolutely immunized from regulatory review and enforcement.

For example, in the field of automobile distribution, NDRC is reportedly taking steps to increase the bargaining power of dealers vis-à-vis the large automobile manufacturers. As background, the Union of Mercedes Benz Dealers in China (the Union) was set up under the China Automobile Dealers' Association with the objective of raising the unified dealers' bargaining power in their dealings with the manufacturers. As reported, the Union, which consists of more than 120 dealers,

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84 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 420 (5th ed. 2002), citing U.S. DEPT. OF JUSTICE AND FTC ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, § 3.31(a) (2000).

85 COMPETITOR COLLABORATION GUIDELINES, *Workshop on revising the Anti-Unfair Competition Law held*, http://www.saic.gov.cn/fldyfbzdjz/tpbd/201007/t20100727_93544.html (accessed Jan. 17, 2013), at § 3.31(a). Seeking to spur joint research and development collaborations, the United States Congress, in 1984, sought to address potential concerns and perceptions that the prospect of antitrust challenges was partially responsible for the reluctance of competitive firms in the United States to undertake joint research and development activities. REPORT OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, ON S. 1841 (THE NATIONAL PRODUCTIVITY AND INNOVATION ACT), May 3, 1984 at 2–3. The United States Congress sought to allay such concerns by passing the National Cooperative Research Act of 1984 (P.L. 98-462), which expressly allowed competitors to engage in joint research and development activities without the fear of possible treble damage antitrust liability. 15 U.S.C. § 4301 et seq. Following the lead of the United States Congress, the American agencies have issued formal positions favoring R&D collaborations through their Competitor Collaboration Guidelines. *See also* U.S. DEPT. OF JUSTICE AND FTC ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995).
The European Union has adopted a similar stance. Agreements that infringe Article 101(1) can still be justified under Article 101(3) if the agreement "contribute[s] to improving the production or distribution of goods or to promoting technical or economic progress...." *See* European Commission Guidelines on the Application of Article 101(3) of the Treaty, OJ [2004] C101/97.

communicates with the manufacturer on some common issues in the distribu channel, including channel improvement, bundling, pricing, etc. According to me reports, the Union has been approved or registered by relevant regulating agencie One may reasonably infer that the information exchanged between the Union membe will be deemed by the authorities as having the effect of improving efficiencies in automobile distribution industry. It seems likely that even if some business informati could be deemed as sensitive in normal cases, such information exchanges may exempted from legal responsibilities, so long as the information was not clea exchanged for anti-competitive cartel purposes.[87]

Similarly, businesses seeking exemptions from the AML should be prepared demonstrate why and how their information exchanges actually are designed to rea the target above.

[2] *Potential Market Share Exemptions*

Where small competitors' combined market shares are limited, information exchang between them (which are not for cartel purposes) are unlikely to be viewed anti-competitive given the constraints imposed by other larger competitors. Therefo low market shares may create a safe harbor to provide collaborating competitors wi a degree of certainty and security.

In the United States, Section 4.2 "Safety Zone for Competitor Collaboration General" of the Antitrust Guidelines for Collaborations among Competitors issued the FTC and the Department of Justice provide a 20% safe zone.[88] Absent extraordi circumstances, American antitrust enforcement agencies will not challenge a comp tor collaboration when the market shares of the collaboration and its participa collectively account for no more than 20% of each relevant market in which com tition may be affected.[89]

China has not yet set any official safe harbors either for merger control review cartel and abuse of dominance cases. It is unclear, therefore, whether low ma shares would create possible exemptions in such cases. Going forward, it theref seems that the Chinese regulators may consider businesses with lower market sh to be exempted from such regulations. As previously discussed, it may be possibl

86. *See* http://auto.21cbh.com/HTML/2012-12-12/xMNDgxXzU4MTYxMg.html (accessed Ma 2013).
87. *See* http://www.competitionlaw.cn/show.aspx?id=6593&cid-5 (accessed Mar. 1, 2013).
88. The safety zone, however, does not apply to agreements that are per se illegal, or that be challenged without a detailed market analysis, or to competitor collaborations to wh merger analysis is applied.
89. For example, with a collaboration among two competitors where each participant indivi holds a 6% market share in the relevant market and the collaboration separately holds market share in the relevant market, the combined market share in the relevant mar purposes of the safety zone would be 15%. This collaboration, therefore, would fall with safety zone. However, if the collaboration involved three competitors, each with a 6% m share in the relevant market, the combined market share in the relevant market for purp the safety zone would be 21%, and the collaboration would fall outside the safety zon

argue that information exchanges carried out by such smaller businesses were designed under Article 15(1)(3) to "enhance competitiveness of small and medium-sized enterprises."[90]

[3] *Exempted Industries*

Similar as the United States[91] and the EU,[92] Article 56 of the AML expressly provides that the "law shall not apply to alliances or other concerted practices of agricultural producers and farmers' economic organizations during the course of production, processing, sales, transportation, storage and other operating activities of agricultural products." Therefore, information exchange for the purpose above will be exempted from antitrust liabilities. However, it is worthwhile to note that this exemption only applies to agricultural producers and rural economic organizations, and obviously does not mean that all coordinated behavior on agricultural products will enjoy antitrust immunity. This is endorsed by NDRC's enforcement activities against a price cartel between dealers of green mung beans and garlic in 2010.[93]

§7.04 CONCLUSION

The area of competitive information exchanges in China is complex and fraught with potential pitfalls for business and lawyers. Many, if not most, such exchanges are likely to be seen as pro-competitive and legal under the AML. However, since such exchanges can be seen as helping to implement and enable illegal cartels and anti-competitive agreements, they should be carefully reviewed, approved, and monitored on a case-by-case basis.

In carrying out competitive analyses, companies should not shirk from asking tough questions such as: (1) why is it necessary to exchange this competitive business information?; (2) what are we hoping to accomplish?; and (3) is one of the ostensible purposes of the exchange to increase or control prices, or to reduce industry output or capacity? Unless there are no likely anti-competitive motives or potential effects, companies may wish to reconsider the necessity of the competitive information exchange. Companies also should take a long hard look before agreeing to exchange competitively sensitive information such as customer data or future pricing or production plans. There is much at stake, considering the potential high costs of a regulatory finding that competitive business information was exchanged as part of a concerted practice or monopoly agreement that violates the AML.

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90 MOFCOM currently is drafting rules on expedited merger rules, which may expressly set certain market shares as a standard for the possible application of its review process.

91 Clayton Act § 6, 15 U.S.C. § 17. sec. 6 of the Clayton Act permits, among other things, the operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit.

92 Council Regulation No. 26/62 of Apr. 4, 1962 applying certain rules of competition to production of and trade in agricultural products.

93 *See* http://politics.people.com.cn/GB/1027/12031993.html (accessed Mar. 1, 2013).

Consistent with the laws of other jurisdictions, chapter 2 of the Anti-Monopoly Law (AML)[1] prohibits agreements between undertakings that have adverse effects on competition.[2] The AML's provisions regarding anti-competitive agreements are largely modeled on European Union (EU) law, though some important differences exist, even if those may be unintended.[3]

Article 1 of the AML provides that the law is enacted for the purpose of preventing and prohibiting "monopolistic conduct," which includes "monopoly agreements among undertakings."[4] Article 13 defines monopoly agreements as "agreements, decisions or other concerted behaviors that eliminate or restrict competition". Articles 13 and 14 of the AML provide lists of types of agreements between respectively competing undertakings (Article 13) and between undertakings and trading partners (Article 14) that are prohibited. These lists are not exhaustive as they can be expanded by the Anti-Monopoly Enforcement Authority (AMEA).[5] Agreements that would otherwise be prohibited under Article 13 or 14 may be exempted if the agreement is entered into for one of the purposes set out in Article 15 and certain conditions are met. Violations of the monopoly agreement provisions are subject to both administrative penalties and civil liability, including substantial fines and orders to cease violations.[6]

Both State Administration for Industry and Commerce (SAIC) and National Development and Reform Commission (NDRC) have jurisdiction over enforcement of certain aspects of the monopoly agreement provisions of the AML, though the precise contours of their respective jurisdictions are not

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1. Fanlongduan Fa [Anti-Monopoly Law (AML)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Issue No. 6, *available in Chinese at* http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm (last visited Feb. 28, 2011), *an English translation available at* http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (last visited Feb. 28, 2011) (P.R.C.).
2. *Cf.* TFEU, art. 101, prohibiting certain types of agreements that "have as their object or effect the prevention, restriction or distortion of competition within the common market. . . ."; U.S. Sherman Act, Section 1, 15 U.S.C. § 1, declaring illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."
3. For example, while Article 101 of the TFEU applies broadly to all agreements, the AML makes a distinction between agreements among competitors and agreements between undertakings and their trading partners. In addition, the AML provides for a limited—but expandable—list of prohibited agreements, while Article 101 of the TFEU applies to all agreements restricting competition. Second, the grounds for exemption are different. Third, the AML does not provide that agreements in violation of Section 2 of the AML are automatically void, as does Article 101(2) of the TFEU, although such agreements would appear to be void under Articles 52 and 329 of the Contract Law.
4. AML, art. 3.
5. AML, art. 13(6) and art.14(3).
6. AML, art. 46.

yet clear.[7] Both agencies have promulgated rules designed to explain their interpretations and approaches to enforcement of the monopoly agreement provisions of the AML.

Moreover, both the Price Law[8] and the Anti-Unfair Competition Law (AUCL),[9] which predate the AML, prohibit collusive activities.[10] Unlike those antecedents, the AML imposes this prohibition in the context of a comprehensive competition law enacted for the purposes, *inter alia*, of protecting competition and enhancing economic efficiency.[11]

Finally, the AML does not explicitly adopt the *per se* rule and rule of reason approaches followed in the EU, U.S. and other major jurisdictions. Generally, other jurisdictions have categorized "hardcore" restraints that have no legitimate efficiency-enhancing purpose, as *per se* offenses, meaning that they will be condemned without an inquiry into whether they cause an adverse effect on competition; such harm to the competitive process is presumed.[12] Conduct typically included within the *per se* category includes naked horizontal price-fixing and output agreements, as well as horizontal agreements to allocate markets, through which each party to the agreement agrees to restrict its

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7. For a general discussion of the specific responsibilities and jurisdictions of the AMEAs, see Chapter 7.
8. Jiage Fa [Price Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998) 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., Issue No. 7, *available in Chinese at* http://www.npc.gov.cn/wxzl/gongbao/1997-12/29/content_1480187.htm (last visited Mar. 1, 2011), *an English translation at* http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383577.htm (last visited Mar. 1, 2011) (P.R.C.).
9. Fan Buzhengdang Jingzheng Fa [Law of the People's Republic of China Against Unfair Competition (also referred to as the AUCL)] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. Issue No. 5, *available in Chinese at* http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004600.htm (last visited Mar. 1, 2011), *translated at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm (last visited Mar. 1, 2011) (P.R.C.).
10. *See* Price Law, art. 14 (listing several conduct including price fixing as "unfair pricing conduct"). *See* AUCL, art. 15 (prohibiting collusion with other bidders or with the company offering to bid in order to change the bid price or exclude other bidders from competition). For discussion of enforcement of other competition related laws such as the Price Law and the AUCL, see Chapter 9.
11. AML, art. 1.
12. *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (the U.S. Supreme Court declared that a direct (i.e. "naked") price-fixing agreements among competitors per se unlawful, regardless of whether the price charged was reasonable); under U.S. law, the use of the *per se* rule is confined to restraints "that would always or almost always tend to restrict competition and decrease output." Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988); see also case T-14/89, Montedipe SpA v Commission [1992] ECR II-1155, para 265 (the EU's General Court (formerly the "Court of First Instance") declaring that "price fixing, output limitations and market allocation agreements preclude "the application of a rule of reason, . . . and must be regarded as an infringement per se of the competition rules").

competition to a particular geographic area, set of customers, or type of products. In contrast, most major jurisdictions use one or more forms of the rule of reason to analyze whether agreements that have a legitimate "ancillary" purpose should be found to be a violation. In general, the rule of reason balances the harm that the challenged conduct causes to competition against its beneficial purposes.[13] It remains to be seen whether China will adopt these categories. To an extent, however, the exemptions in Article 15 of the AML create an approach analogous to the rule of reason for monopoly agreements that are entered into for certain beneficial purposes.[14]

I. Scope of Application of Chapter 2 of the AML

A. The Notion of an "Undertaking"

Articles 13 and 14 of the AML prohibit monopoly agreements respectively between competing undertakings (Article 13) and between undertakings and their trading partners, *i.e.* vertical agreements (Article 14). Article 12 of the AML defines "undertaking" (*jingyingzhe*)[15] as "a natural person, a legal

13. *See* generally PHILLIP E. AREEDA, HERBERT HOVENKAMP, ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION XI¶ 1906 (Aspen Publisher 2005) (hereinafter "AREEDA & HOVENKAMP ¶ 2000c") (discussing types of agreements in which the price-fixing component may be deemed ancillary to a legitimate purpose and thus properly subject to rule of reason review).

14. Some Chinese scholars have opined that due to the exemption provision of Article 15, no absolute *per se* rule has been adopted in China, and all the cases need to be analyzed according to the rule of reason—at least, the exemption provision should be taken into consideration. *See* WANG XIANLIN, COMPETITION LAW, 247(China Renmin University Press 2009) (hereinafter "WANG XIANLIN, COMPETITION LAW"); SHI JICHUN, ANTI-MONOPOLY LAW INTERPRETATIONS AND APPLICATIONS, 118 (China Legal Publishing House 2007) (hereinafter "SHI JICHUN, INTERPRETATIONS AND APPLICATIONS OF AML"); CAO KANGTAI, AN INTERPRETATION OF ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA: CONCEPTS, SYSTEMS, MECHANISMS, MEASURES, 69 (China Legal Publishing House2007) (hereinafter "CAO KANGTAI, INTERPRETATIONS OF AML"). However, it is believed that a distinction between the *per se* rule and the rule of reason analysis during enforcement will help to prevent monopoly agreements that have obvious anti-competitive effect. *See Id.*, WANG XIANLIN, COMPETITION LAW, 247. But *see* Wu Zhenguo, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. (2008), at 73 and 81 (2008) ("Exemptions for monopoly agreements mean that even though the agreements, resolutions, or other coordinated acts between the operators in question *do* eliminate or restrict competition and *do* qualify as monopoly agreements, the benefits such agreements bring in other respects are greater than their harm to the competition order. Therefore, the law provides that such agreements may be exempted from the application of the AML.") (emphasis in original).

15. Although "undertaking" is used in the official English translation of the AML published by the National People's Congress and thus also throughout this treatise, the Chinese term *jingyingzhe* (经营者) is perhaps more accurately or literally translated as "business operator."

person or any other organization that engages in the production or operation of commodities or provisions of services." This is a broad definition similar to the notion of "undertaking" under EU law.[16]

It should be noted that farming and rural economic organizations, although they likely constitute undertakings under the AML, are exempted from the monopoly agreement provisions.[17] Finally, trade associations and State-owned enterprises constitute "undertakings" under the AML, even if the rules applicable to their behavior may differ from those generally applicable to other undertakings.[18]

B. The Notion of "Agreement"

Articles 13 and 14 of the AML apply to "monopoly agreements," which refers to "agreements, decisions or other concerted practices that eliminate or restrict competition." These terms seem to be inspired by the relevant provisions of EU law[19] and can be expected to be interpreted broadly.[20] In this

16. Under EU law, an undertaking is an entity engaged in economic activity, i.e., any activity consisting in offering goods and services on a given market. *See* J. FAULL & A. NIKPAY, THE EC LAW OF COMPETITION ¶ 3.27 (2nd ed. Oxford University Press 2007).
17. Article 56 of the AML provides that "This law is not applicable to the alliance or other concerted actions conducted by agricultural producer and rural economic organizations in such operational activities as production, processing, sales, transportation, and storage of agricultural commodities." This article may be interpreted to cover farming and rural organizations involved in a broad range of agricultural activities including farming, forestry, animal husbandry, and fishery. It is intended to benefit agricultural producers (including farmers, farmers' enterprises, and other entities that directly engage in agricultural activities), as well as rural economic organizations (including rural collective economic organizations and specialized cooperative economic organizations of farmers).
18. See Chapter 5.
19. In particular, Article 101(1) of the TFEU, which prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices [. . .] which have as their object or effect the prevention, restriction or distortion of competition [. . .]" .
20. *See, e.g.*, J. FAULL & A. NIKPAY, *supra* note 16, ¶¶ 3.47–.49 ("The term 'agreement' is defined widely for the purposes of TFEU Article 101(1). For an agreement to exist it "is sufficient if the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way" . . . . [U]nilateral conduct does not fall within the scope of Article [101]. . . . A "concurrence of wills" does not have to take the form of a legally binding contract. . . . It can be written or oral, signed or unsigned. The concept is wide enough to catch arrangements such as "gentlemen's agreements," simple "understandings," the constitution of a trade association or non-binding marketing guidelines.") (citations omitted); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984) ("The correct standard [for proving an agreement that violates Section 1 of the Sherman Act] is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.").

respect, Article 5 of the NDRC Anti-Price Monopoly Rules defines monopoly agreements as "agreements, decisions or other concerted practices between two or more undertakings, in written or oral forms, which have the effects of eliminating or restricting competition with respect to price."[21] The SAIC Rules on the Prohibition of Monopoly Agreements have a similar definition.[22] Despite the terminology, no party to a "monopoly agreement" need be a monopolist, and the agreement need not create or maintain a monopoly in order for an agreement to constitute a violation.

1. Tacit Collusion as an "Agreement" under the AML

There is at this stage some uncertainty regarding whether the AMEAs will consider tacit collusion (i.e. a common course of action arrived at without any expression or communication, verbal or otherwise, through independent decision-making by each party's taking into account its expectation of the other party's continuing in that course of action) to constitute a monopoly agreement under the AML. Tacit collusion is not the same as "tacit agreement", which is sometimes used to describe a common understanding reached through some form of communication between the parties that is expressed or communicated, though not verbally or in writing.

Article 13 of the AML provides that the notion of monopoly agreement includes "concerted practices", which is repeated in both the NDRC Anti-Price Monopoly Rules and SAIC Rules on the Prohibition of Monopoly Agreements. However, the SAIC Rules on the Prohibition of Monopoly Agreements add further that the notion of "other concerted practices", "shall mean colluded coordination in practice between undertakings without express oral or written agreements or decisions."[23] Also, both the NDRC Rules and SAIC Rules list several factors to be taken into account in finding of "other concerted practice" under the AML, which include (1) uniformity of conduct; (2) circumstances of any communications between the undertakings; and (3) any reasonable justification for the uniformity of conduct.[24]

In most other jurisdictions, tacit collusion is generally not considered to constitute an anticompetitive agreement but rather often merely represents

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21. Fan Jiage Longduan Guiding [NDRC Anti-Price Monopoly Rules] (published by NDRC, Jan. 4, 2010), *available in Chinese at* http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/t20110104_389393.htm (last visited Feb.1, 2011) (P.R.C.), art. 4.
22. Guanyu Jinzhi Longduan Xieyi Xingwei de Youguan Guiding [SAIC Rules on the Prohibition of Monopoly Agreements] ("SAIC Rules on the Prohibition of Monopoly Agreements") (published by SAIC, Jan. 4, 2011), *available in Chinese at* http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103266.html (last visited Feb. 1, 2011) (P.R.C.), art. 2.
23. *See* Article 2(4). The NDRC Anti-Price Monopoly Rules do not include such a language.
24. NDRC Anti-Price Monopoly Rules, art. 6; SAIC Rules on the Prohibition of Monopoly Agreements, art. 3.

normal competitive behavior, especially in oligopolistic markets.[25] Where the parallel behavior is plausibly consistent with independent action and serves a legitimate business purpose, most jurisdictions that have addressed the issue do not permit an inference of unlawful collusion based solely on the similar conduct. Where, however, the conduct is not plausibly justified by serving a purpose other than facilitating collusion, such an inference may be permitted.[26]

2. Tacit Acquiescence in Vertical Relationships

Unlike horizontal collusion, vertical agreements may be imposed by one party on another. Accordingly, whether a course of conduct adhering to a restrictive term in an agreement between a supplier and a purchaser should be considered an agreement between those parties presents a different question than similar facts in the horizontal context. Other jurisdictions have formulated rules to determine when vertical restraints announced by one transaction party and in which the other acquiesces will constitute the requisite agreement to establish a violation.[27]

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25. *See, e.g.*, FAULL & NICKPAY, *supra* note 16, ¶ 8.57 ("if the Commission is not able to establish to the required standard that contacts between competitors have taken place, it seems that parallel conduct in the market will not be deemed unlawful, as uncertainty about the future conduct of each undertaking of the market is preserved."). *See* also Case 48/69 ICI v. Commission, [1972] ECR 619, para. 66 (while parallel pricing, standing alone, does not constitute a concerted practice, "it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market having regard to the nature of the products, the size and number of undertakings, and the volume of the said market").
26. *See generally* George A. Hay, *Facilitating Practices, in* II ABA Section of Antitrust Law, ISSUES IN COMPETITION LAW AND POLICY, 1189–1217 (2008); Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). *See also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interest and their interdependence with respect to price and output decisions."); Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (while evidence of parallel conduct or interdependence may be consistent with the existence of a conspiracy, it is equally consistent with a "wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) ("individual pricing decisions (even when each firm rests its own decision upon its belief the competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act") (Breyer, J., emphasis in original);
27. Under EU law, the "mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by [TFEU Article 101(1)]. Thus, the mere fact that a measure

Broadcast Music, which we studied earlier in this Chapter, and our next case, *Nat'l Soc'y of Prof'l Eng'rs*, which was decided a year before *Broadcast Music*, evidence two important trends that materialized in the Supreme Court in the late 1970s. First, as we have already noted, the Court began to move away from heavy reliance on per se rules. In doing so it returned to *Chicago Bd. of Trade's* loose framework, but was compelled to confront its vagueness. That triggered a second trend—a still evolving effort by the Court to move the rule of reason towards greater certainty, particularity, and predictability. In this effort, as will be seen, the courts have developed a variety of "quick look" rules and structured inquiries for implementing the rule of reason. That process of evolution continues today, and will be evident in much of the material considered in the remainder of this Chapter and in Chapter 8.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS v. UNITED STATES

Supreme Court of the United States, 1978.
435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637.

Mr. Justice STEVENS delivered the opinion of the Court.

This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association. The Court of Appeals affirmed. * * * Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm.

I

Engineering is an important and learned profession. There are over 750,000 graduate engineers in the United States, of whom about 325,000 are registered as professional engineers. * * * They perform services in connection with the study, design, and construction of all types of improvements to real property—bridges, office buildings, airports, and factories are examples. * * *

The National Society of Professional Engineers (Society) was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members. Its present membership of 69,000 resides throughout the United States and in some foreign countries. * * *

The charges of a consulting engineer may be computed in different ways. He may charge the client a percentage of the cost of the project, may set his fee at his actual cost plus overhead plus a reasonable profit, may charge fixed rates per hour for different types of work, may perform an assignment for a specific sum, or he may combine one or more of these approaches. Suggested fee schedules for particular types of services in certain areas have been promulgated from time to time by various local societies. This case does not,

however, involve any claim that the National Society has tried to fix specific fees, or even a specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the question of fees until after a prospective client has selected the engineer for a particular project. Evidence of this agreement is found in § 11(c) of the Society's Code of Ethics, adopted in July 1964.[3]

* * *

In 1972 the Government filed its complaint against the Society alleging that members had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services and that, in consequence, price competition among the members had been suppressed and customers had been deprived of the benefits of free and open competition. The complaint prayed for an injunction terminating the unlawful agreement.

In its answer the Society admitted the essential facts alleged by the Government and pleaded a series of affirmative defenses, only one of which remains in issue. In that defense, the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer "to design and specify inefficient and unnecessarily expensive structures and methods of construction." * * * Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an "unreasonable restraint of interstate trade or commerce."

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II

* * *

A. The Rule of Reason.

One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract that restrains trade is unlawful. * * * But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; * * * read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-

3. That section, which remained in effect at the time of trial, provided:

"Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. * * *

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. * * *

law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

* * *

The Rule of Reason * * * has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.* That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.

The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason. * * *

The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. * * * Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade,* to the Court opinion written by Mr. Justice Powell in *Continental T. V., Inc.,* the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." [*Chicago Bd. of Trade,*] 246 U.S. at 238.

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se.*" In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide

whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

B. The Ban on Competitive Bidding

Price is the "central nervous system of the economy," and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health.[19] The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court has never accepted such an argument.

It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project. Based on these considerations, a purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs the

19. The Society also points out that competition, in the form of bargaining between the engineer and customer, is allowed under its canon of ethics once an engineer has been initially selected. It then contends that its prohibition of competitive bidding regulates only the *timing* of competition, thus making this case analogous to *Chicago Board of Trade*. * * * We find this reliance on *Chicago Board of Trade* misplaced for two reasons. First, petitioner's claim mistakenly treats negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers. Second, even if we were to accept the Society's equation of bargaining with price competition, our concern with *Chicago Board of Trade* is in its formulation of the proper test to be used in judging the legality of an agreement; that formulation unquestionably stresses impact on competition. Whatever one's view of the application of the Rule of Reason in that case, the Court considered the exchange's regulation of price information as having a positive effect on competition. The District Court's findings preclude a similar conclusion concerning the effect of the Society's "regulation."

advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust attack.

The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

* * *

* * * We adhere to the view * * * that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. Such a view of the Rule would create the "sea of doubt" on which Judge Taft refused to embark in *Addyston*, and which this Court has firmly avoided ever since.

* * *

[Justice Brennan took no part in the consideration or decision of the case. The opinion of Mr. Justice Blackmun, with whom Mr. Justice Rehnquist joined,

concurring in part and concurring in the judgment, is omitted, as is the opinion of Mr. Chief Justice Burger, concurring in part and dissenting in part. Eds.]

Suppose the NSPE had evidence that when engineers engaged in competitive bidding the buildings and bridges they helped to build were more likely to have safety problems. For example, suppose—contrary to fact—that the NSPE only had members in half of the states, and it proffered an expert witness prepared to testify that in the 50% of states where the Society's Code of Ethics did not apply engineering services were lower in quality as well as lower in price. Should the NSPE have been permitted to introduce the expert's testimony? Why or why not?

Note on the Rule of Reason After Nat'l Soc'y Prof'l Eng'rs and Broadcast Music

The bipolar analytical framework described in *Nat'l Soc'y Prof'l Eng'rs* ("*NSPE*") had a significant impact on the allocation of the burdens of production and proof in antitrust cases. For cases falling under the per se rule, plaintiffs needed only to establish concerted action of a kind that fell within one of the recognized per se categories, like price-fixing, division of markets, or certain group boycotts. The courts would then presume that such conduct had the requisite unreasonable anticompetitive effect. As we have already noted, in evidentiary terms, the per se rule created an irrebuttable presumption of unreasonableness.

Under the rule of reason, *Chicago Bd. of Trade*'s approach called for a thorough-going, multi-factored analysis to prove that a given restraint was in fact unreasonable. When *Chicago Bd. of Trade* was combined with *NSPE*, it appeared that in a rule of reason case (in contrast to the per se approach), the plaintiff would have to introduce evidence of likely or actual adverse competitive effects and the defendants would be permitted to introduce evidence to rebut the plaintiff's case. The scope of the defendant's rebuttal would not be restricted, provided it was directed at the issue of effects. The Court made clear that "ruinous competition," like "reasonable prices," would not constitute a cognizable defense. But beyond this limitation, the specific requirements of burden shifting remained to be addressed.

In practice, plaintiffs found it much easier to prove cases under the per se rule than the rule of reason. In consequence, a court's determination as to whether the alleged conduct fell within or outside a category of per se conduct—a decision often termed "categorization" of the case—often was outcome determinative. The Court in *NSPE* twice emphasized, however, that whether the per se or rule of reason is applied, "the purpose of the analysis is to form a judgment about the competitive significance of the restraint." Even though the "rule of reason" and "per se rule" were specified as distinct modes of analysis, therefore, the Court made clear that they represented two paths to implementing the same underlying standard, the standard of "reasonableness." Accordingly, the "per se rule" can fairly be viewed as just an abbreviated method of applying the rule of reason.

Additional guidance in applying the rule of reason came a year after *NSPE* in the Court's decision in *Broadcast Music*. *Broadcast Music* appeared to mandate consideration of efficiencies, both in characterizing the conduct to determine

goal, therefore, was not specifically to synthesize and explain all of its prior decisions, something it may have occasion to do in the future.

In the section that follows, we will explore the more contemporary treatment by the Court of collusive group boycotts, starting with perhaps the most easily identifiable, and controversial, recent case of a very visible, collusive group boycott. We will return to the topic in Chapter 7, where we examine boycotts having exclusionary effects.

As noted above, most of the traditional Supreme Court cases, many of which are associated with the use of the per se rule, involved exclusionary, not collusive group boycotts. In our next case, *Superior Court Trial Lawyers Ass'n* (*SCTLA*), the Court focused on a collusive group boycott. As you read the case, reflect on the issues raised in Sidebar 2–3. Does the "group boycott" label add anything to the economic analysis of the conduct challenged in *SCTLA*? Note too how the Court struggles with the fact that some boycotts may contain an expressive component that may be protected in part by the First Amendment.

FEDERAL TRADE COMMISSION v. SUPERIOR COURT TRIAL LAWYERS ASS'N

Supreme Court of the United States, 1990.
493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851.

Justice STEVENS delivered the opinion of the Court.

Pursuant to a well-publicized plan, a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation. The questions presented are whether the lawyers' concerted conduct violated § 5 of the Federal Trade Commission Act and, if so, whether it was nevertheless protected by the First Amendment to the Constitution.

I

The burden of providing competent counsel to indigent defendants in the District of Columbia is substantial. During 1982, court-appointed counsel represented the defendant in approximately 25,000 cases. In the most serious felony cases, representation was generally provided by full-time employees of the District's Public Defender System (PDS). Less serious felony and misdemeanor cases constituted about 85 percent of the total caseload. In these cases, lawyers in private practice were appointed and compensated pursuant to the District of Columbia Criminal Justice Act (CJA).

Although over 1,200 lawyers have registered for CJA appointments, relatively few actually apply for such work on a regular basis. In 1982, most appointments went to approximately 100 lawyers who are described as "CJA regulars." These lawyers derive almost all of their income from representing indigents. * * *

In 1974, the District created a Joint Committee on Judicial Administration with authority to establish rates of compensation for CJA lawyers not exceeding the rates established by the federal Criminal Justice Act of 1964. After 1970, the federal Act provided for fees of $30 per hour for court time

and $20 per hour for out-of-court time. * * * These rates accordingly capped the rates payable to the District's CJA lawyers, and could not be exceeded absent amendment to either the federal statute or the District Code.

Bar organizations began as early as 1975 to express concern about the low fees paid to CJA lawyers. Beginning in 1982, respondents, the Superior Court Trial Lawyers Association (SCTLA) and its officers, and other bar groups sought to persuade the District to increase CJA rates to at least $35 per hour. Despite what appeared to be uniform support for the bill, it did not pass. It is also true, however, that nothing in the record indicates that the low fees caused any actual shortage of CJA lawyers or denied effective representation to defendants.

* * *

At a SCTLA meeting [in the Summer of 1983], the CJA lawyers voted to form a "strike committee." The eight members of that committee promptly met and informally agreed "that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments, and that the boycott should aim for a $45 out-of-court and $55 in-court rate schedule."

On August 11, 1983, about 100 CJA lawyers met and resolved not to accept any new cases after September 6 if legislation providing for an increase in their fees had not passed by that date. Immediately following the meeting, they prepared (and most of them signed) a petition stating:

> "We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act."

On September 6, 1983, about 90 percent of the CJA regulars refused to accept any new assignments. Thereafter, SCTLA arranged a series of events to attract the attention of the news media and to obtain additional support. * * *

* * *

Within 10 days, the key figures in the District's criminal justice system "became convinced that the system was on the brink of collapse because of the refusal of CJA lawyers to take on new cases." On September 15, they hand-delivered a letter to the Mayor describing why the situation was expected to "reach a crisis point" by early the next week and urging the immediate enactment of a bill increasing all CJA rates to $35 per hour. The Mayor promptly met with members of the strike committee and offered to support an immediate temporary increase to the $35 level as well as a subsequent permanent increase to $45 an hour for out-of-court time and $55 for in-court time.

At noon on September 19, 1983, over 100 CJA lawyers attended an SCTLA meeting and voted to accept the $35 offer and end the boycott. The city council's Judiciary Committee convened at 2 o'clock that afternoon. The committee recommended legislation increasing CJA fees to $35, and the council unanimously passed the bill on September 20. On September 21, the CJA regulars began to accept new assignments and the crisis subsided.

II

The Federal Trade Commission (FTC) filed a complaint against SCTLA and four of its officers (respondents) alleging that they had "entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the CJA program." The complaint alleged that virtually all of the attorneys who regularly compete for or accept new appointments under the CJA program had joined the agreement. The FTC characterized respondents' conduct as "a conspiracy to fix prices and to conduct a boycott" and concluded that they were engaged in "unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act."

After a 3-week hearing, the ALJ found that the facts alleged in the complaint had been proved, and rejected each of the respondents' three legal defenses—that the boycott was adequately justified by the public interest in obtaining better legal representation for indigent defendants; that as a method of petitioning for legislative change it was exempt from the antitrust laws under our decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and that it was a form of political action protected by the First Amendment under our decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The ALJ nevertheless concluded that the complaint should be dismissed because the District officials, who presumably represented the victim of the boycott, recognized that its net effect was beneficial. * * *

The ALJ's pragmatic moderation found no favor with the FTC. Like the ALJ, the FTC rejected each of respondents' defenses. It held that their "coercive, concerted refusal to deal" had the "purpose and effect of raising prices" and was illegal *per se*. Unlike the ALJ, the FTC refused to conclude that the boycott was harmless, noting that the * * * boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the respondents. * * *

The Court of Appeals vacated the FTC order and remanded for a determination whether respondents possessed "significant market power." The court began its analysis by recognizing that absent any special First Amendment protection, the boycott "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act." * * * The Court of Appeals was not persuaded by respondents' reliance on *Claiborne Hardware* or *Noerr*, or by their argument that the boycott was justified because it was designed to improve the quality of representation for indigent defendants. It concluded, however, that "the SCTLA boycott did contain an element of expression warranting First Amendment protection." It noted that boycotts have historically been used as a dramatic means of expression and that respondents intended to convey a political message to the public at large. It therefore concluded that under *United States* v. *O'Brien*, 391 U.S. 367 (1968), a restriction on this form of expression could not be justified unless it is no greater than is essential to an important governmental interest. This test, the court reasoned, could not be satisfied by the application of an otherwise

appropriate *per se* rule, but instead required the enforcement agency to "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns." * * *

* * *

III

* * * We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. Moreover, given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate, we may also assume that without the boycott there would have been no increase in District CJA fees at least until the Congress amended the federal statute. These assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements.

As the ALJ, the FTC, and the Court of Appeals all agreed, respondents' boycott "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act." As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act. Prior to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services to the District at CJA rates. The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that CJA regulars offered. "This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered." The horizontal arrangement among these competitors was unquestionably a "naked restraint" on price and output.

* * *

The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful. The statutory policy underlying the Sherman Act "precludes inquiry into the question whether competition is good or bad." Respondents' argument * * * ultimately asks us to find that their boycott is permissible because the price it seeks to set is reasonable. But it was settled shortly after the Sherman Act was passed that it * * * is no excuse that the prices fixed are themselves reasonable. * * *

Our decision in *Noerr* in no way detracts from this conclusion. In *Noerr*, we "considered whether the Sherman Act prohibited a publicity campaign waged by railroads" and "designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers." Interpreting the Sherman Act in the light of the First Amendment's Petition Clause, the Court noted that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had."

It of course remains true that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws," even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors. But in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

* * *

IV

SCTLA argues that if its conduct would otherwise be prohibited by the Sherman Act and the Federal Trade Commission Act, it is nonetheless protected by the First Amendment rights recognized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). That case arose after black citizens boycotted white merchants in Claiborne County, Mississippi. The white merchants sued under state law to recover losses from the boycott. We found that the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." * * *

* * *

The activity that the FTC order prohibits is a concerted refusal by CJA lawyers to accept any further assignments until they receive an increase in their compensation; the undenied objective of their boycott was an economic advantage for those who agreed to participate. * * * Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. They were black citizens in Port Gibson, Mississippi, who had been the victims of political, social, and economic discrimination for many years. They sought only the equal respect and equal treatment to which they were constitutionally entitled. * * * As we observed, the campaign was not intended "to destroy legitimate competition." * * * Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it.

The same cannot be said of attorney's fees. * * * [O]ur reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market." * * *

* * *

V

* * *

The Court of Appeals, however, crafted a new exception to the *per se* rules, and it is this exception which provoked the FTC's petition to this Court. The Court of Appeals derived its exception from *United States v. O'Brien*, 391

U.S. 367 (1968). In that case O'Brien had burned his Selective Service registration certificate on the steps of the South Boston Courthouse. He did so before a sizable crowd and with the purpose of advocating his antiwar beliefs. We affirmed his conviction. We held that the governmental interest in regulating the "nonspeech element" of his conduct adequately justified the incidental restriction on First Amendment freedoms. * * *

However, the Court of Appeals held that, in light of *O'Brien*, the expressive component of respondents' boycott compelled courts to apply the antitrust laws "prudently and with sensitivity," . . . with a "special solicitude for the First Amendment rights" of respondents. The Court of Appeals concluded that the governmental interest in prohibiting boycotts is not sufficient to justify a restriction on the communicative element of the boycott unless the FTC can prove, and not merely presume, that the boycotters have market power. Because the Court of Appeals imposed this special requirement upon the government, it ruled that *per se* antitrust analysis was inapplicable to boycotts having an expressive component.

There are at least two critical flaws in the Court of Appeals' antitrust analysis: it exaggerates the significance of the expressive component in respondents' boycott and it denigrates the importance of the rule of law that respondents violated. Implicit in the conclusion of the Court of Appeals are unstated assumptions that most economic boycotts do not have an expressive component, and that the categorical prohibitions against price fixing and boycotts are merely rules of "administrative convenience" that do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power.

It would not much matter to the outcome of this case if these flawed assumptions were sound. *O'Brien* would offer respondents no protection even if their boycott were uniquely expressive and even if the purpose of the *per se* rules were purely that of administrative efficiency. * * * The administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." If small parties "were allowed to prove lack of market power, all parties would have that right, thus introducing the enormous complexities of market definition into every price-fixing case." For these reasons, it is at least possible that the *Claiborne Hardware* doctrine, which itself rests in part upon *O'Brien*, exhausts *O'Brien's* application to the antitrust statutes.

In any event, however, we cannot accept the Court of Appeals' characterization of this boycott or the antitrust laws. Every concerted refusal to do business with a potential customer or supplier has an expressive component. At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude. At another level, after the terms of the boycotters' demands have been agreed upon, they must be communicated to its target: "[W]e will not do business until you do what we ask." That

expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott.

At a third level, the boycotters may communicate with third parties to enlist public support for their objectives; to the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters' ideas. But this level of expression is not an element of the boycott. * * *

In sum, there is thus nothing unique about the "expressive component" of respondents' boycott. A rule that requires courts to apply the antitrust laws "prudently and with sensitivity" whenever an economic boycott has an "expressive component" would create a gaping hole in the fabric of those laws. Respondents' boycott thus has no special characteristics meriting an exemption from the *per se* rules of antitrust law.

Equally important is the second error implicit in respondents' claim to immunity from the *per se* rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. * * * The opinion further assumed that the *per se* rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." This statement contains two errors. The *per se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the *per se* rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." * * *

* * *

The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. * * *

So it is with boycotts and price fixing.[16] Every such horizontal arrangement among competitors poses some threat to the free market. A small

16. "In sum, price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in prin-

participant in the market is, obviously, less likely to cause persistent damage than a large participant. Other participants in the market may act quickly and effectively to take the small participant's place. For reasons including market inertia and information failures, however, a small conspirator may be able to impede competition over some period of time. Given an appropriate set of circumstances and some luck, the period can be long enough to inflict real injury upon particular consumers or competitors.

* * *

Of course, some boycotts and some price-fixing agreements are more pernicious than others; some are only partly successful, and some may only succeed when they are buttressed by other causative factors, such as political influence. But an assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless—when overwhelming testimony demonstrated that it almost produced a crisis in the administration of criminal justice in the District and when it achieved its economic goal—is flatly inconsistent with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws.

* * *

[The opinion of Justices Brennan and Marshall, concurring in part, and dissenting in part, is omitted, as is the opinion of Mr. Justice Blackmun, also concurring in part and dissenting in part. Eds.]

What makes *SCTLA* a case of "collusive" group boycott? Note that it could easily be viewed as a price fixing agreement among competitors—the members of the SCTLA collectively agreed upon a specific hourly rate for their services and demanded it from their customer, the District of Columbia. Yet the mechanism chosen to implement the price fixing scheme was a boycott of the buyer, the D.C. government. This point was emphasized near the end of the majority's opinion in response to an argument made by Justice Brennan in his dissent. Brennan argued that in fact not all boycotts had been deemed per se unlawful by the Court. Justice Stevens replied for the majority:

> In response to Justice Brennan's opinion, and particularly to its observation that some concerted arrangements that might be characterized as "group boycotts" may not merit per se condemnation * * * we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement-a type of conspiracy that has been consistently analyzed as a per se violation for many decades.

ciple, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. Moreover, toleration implies a burden of continuous supervision for which the courts consider themselves ill-suited. And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened. The key points are the first two. Without them, there is no justification for categorical condemnation." 7 P. Areeda, Antitrust Law ¶ 1509, pp. 412–413 (1986).

DAY 4, THURSDAY, JULY 3, 2014

1. CASES
    1. *Palmer v. BRG of Georgia* (1990)
    2. *NCAA v. Univ. of Okla.* (1984)
2. ARTICLES/BOOK CHAPTERS
    1. Horton/Huang (pgs. 114-16)(see Day 3)
    2. Competition Law in China (pgs. 91-94)
    3. AML and Practice in China (pgs. 70-73)

Inc., 776 F.2d 185, 188–89 (7th Cir.1985)(Easterbrook, J.). *See also General Leaseways, Inc. v. National Truck Leasing Ass'n.*, 744 F.2d 588 (7th Cir. 1984)(Posner, J.)(implicitly following same approach).

Nevertheless, as we see in the next case, the simple legal principle iterated in *Topco*—that division of markets by competitors is per se illegal—remains very much the law when the parties to the division are true competitors and the conduct evidences no apparent competitive benefits, such as efficiencies.

PALMER v. BRG OF GEORGIA

Supreme Court of the United States, 1990.
498 U.S. 46, 111 S.Ct. 401, 112 L.Ed.2d 349.

PER CURIAM.

In preparation for the 1985 Georgia Bar Examination, petitioners contracted to take a bar review course offered by respondent BRG of Georgia, Inc. (BRG). In this litigation they contend that the price of BRG's course was enhanced by reason of an unlawful agreement between BRG and respondent Harcourt Brace Jovanovich Legal and Professional Publications (HBJ), the Nation's largest provider of bar review materials and lecture services. The central issue is whether the 1980 agreement between respondents violated § 1 of the Sherman Act. * * *

HBJ began offering a Georgia bar review course on a limited basis in 1976, and was in direct, and often intense, competition with BRG during the period from 1977 to 1979. BRG and HBJ were the two main providers of bar review courses in Georgia during this time period. In early 1980, they entered into an agreement that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name "Bar/Bri." The parties agreed that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia.[2] Under the agreement, HBJ received $100 per student enrolled by BRG and 40% of all revenues over $350. Immediately after the 1980 agreement, the price of BRG's course was increased from $150 to over $400.

On petitioners' motion for partial summary judgment as to the § 1 counts in the complaint and respondents' motion for summary judgment, the District Court held that the agreement was lawful. The United States Court of Appeals for the Eleventh Circuit, with one judge dissenting, agreed with the District Court that *per se* unlawful horizontal price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices. The Court of Appeals also agreed with the District Court that to prove a *per se* violation under a geographic market allocation theory, petitioners had to show that respondents had subdivided some relevant market in which they had previously competed. * * *

2. The 1980 agreement contained two provisions, one called a "Covenant Not to Compete" and the other called "Other Ventures." The former required HBJ not to "directly or indirectly own, manage, operate, join, invest, control, or participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise with any business which is operating or participating in the preparation of candidates for the Georgia State Bar Examination." * * * The latter required BRG not to compete against HBJ in States in which HBJ currently operated outside the State of Georgia. * * *

In *United States v. Socony–Vacuum Oil Co.*, we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful, even though there was no direct agreement on the actual prices to be maintained. We explained that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."

The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was "formed for the purpose and with the effect of raising" the price of the bar review course. It was, therefore, plainly incorrect for the District Court to enter summary judgment in respondents' favor. Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.

In *United States v. Topco Associates, Inc.* we held that agreements between competitors to allocate territories to minimize competition are illegal. * * * The defendants in *Topco* had never competed in the same market, but had simply agreed to allocate markets. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. Thus, the 1980 agreement between HBJ and BRG was unlawful on its face.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

* * *

What justifies treating a division of markets by competitors as per se unlawful? How, economically, is it like price fixing? Under what circumstances might it have some justification worth evaluating? Should it be treated as per se unlawful even when there is a plausible efficiency-related justification for the conduct?

Can *BRG* be distinguished from *Topco*? Do both cases present equally compelling cases for imposition of a per se rule? In answering that question, how significant is the evidence cited by the Court in *BRG* that the price of bar review courses increased almost threefold after the agreement between the defendants was adopted? Does the rise in price suggest that BRG had market power? What evidence was there in *Topco* that the defendants had market power? Is the Court implicitly suggesting that market power should be a

seek to overreach in adopting anticompetitive restraints that are arguably "within" the venture, yet are not really necessary to achieve their legitimate aims? *Dagher's* approach, which had never before been articulated by the Court, would seem to elevate form over substance in terms of the economic analysis of specific restraints and creates some additional uncertainty on the role of ancillary restraint analysis.

F. MODERN TRENDS: THE SEARCH FOR A MORE STRUCTURED AND OPERATIONAL RULE OF REASON

Beginning with the Supreme Court's decision in *Nat'l Soc'y of Prof'l Eng'rs*, a third path to unreasonableness began to evolve in the Court's decisions. Proceeding from the assumption that not all cases literally falling into the per se category warrant per se treatment—a conclusion that was apparent in the 1979 decision in *Broadcast Music*, the Court also appeared to recognize that not all cases excused from per se treatment deserved or required "full blown" rule of reason analysis under the *Chicago Bd. of Trade* standard. As a consequence, it began scouting out a middle ground between abrupt per se condemnation and full rule of reason inquiry—a development that has continued.

The Supreme Court and the lower courts also began to address the legacy of *Chicago Bd. of Trade's* rule of reason, searching for ways to better specify the facts most relevant to a rule of reason inquiry and the allocation of burdens among plaintiffs and defendants. This development also continues, especially as the cost of complex litigation such as antitrust cases has become an increasing concern of courts, commentators, and enforcers.

As you read the next case and the note that follows, consider how each of the cases discussed easily could have been pigeon-holed under the traditional horizontal per se categories—but to what end? Perhaps they are better considered as a group that suggests a unified framework for analyzing competitor conduct allegedly having collusive effects. Consider too whether Taft's ancillary restraints approach, as utilized in *Broadcast Music*, played a role in this developing framework.

NATIONAL COLLEGIATE ATHLETIC ASS'N v. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA

Supreme Court of the United States, 1984.
468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70.

Justice STEVENS delivered the opinion of the Court.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act and granted injunctive relief. The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. We granted certiorari, and now affirm.

I

The NCAA

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. * * * With the exception of football, the NCAA has not undertaken any regulation of the televising of athletic events.

The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. * * *

Some years ago, five major conferences together with major football-playing independent institutions organized the College Football Association (CFA). The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

* * *

The Current Plan

The [television] plan adopted in 1981 for the 1982–1985 seasons is at issue in this case. This plan * * * recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance. * * * The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." * * *

In separate agreements with each of the carrying networks, ABC [the American Broadcasting Cos.] and the Columbia Broadcasting System (CBS), the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set forth therein. Each of the networks agreed to pay a specified "minimum aggregate compensation to the participating NCAA member institutions" during the 4-year period in an amount that totaled $131,750,000. In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years and that the District Court found would be followed under the current agreement involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price. The aggregate of all these payments presumably equals the total minimum aggregate compensation set forth in the basic agreement. * * * [T]he amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved.

The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2–year periods that the plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2–year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus * * * the current plan * * * limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan.

Background of this Controversy

Beginning in 1979 CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they had in the NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, developed an independent plan, and obtained a contract offer from the National Broadcasting Co. (NBC). This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members.

In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA–NBC contract. * * * On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions and therefore the agreement was never consummated.

* * *

[Here the Court described in detail the proceedings in the district court and the court of appeals. Although the district court had condemned the NCAA's plan, it did so after a lengthy trial, and it considered each of the NCAA's defenses. In contrast, the Court of Appeals held that the plan should have been treated as per se unlawful price fixing and that, in any event, the procompetitive justifications urged by the NCAA were not supported by the evidence. Eds.]

II

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have

repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. * * * By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high. * * * In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement,[21] on the fact that the NCAA is organized as a nonprofit entity,[22] or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics.[23] Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

* * * What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. * * * Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. * * * Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role,

21. While judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules, the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry. * * *

22. There is no doubt that the sweeping language of § 1 applies to nonprofit entities. * * *

23. While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.

its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Broadcast Music squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. Similarly, as we indicated in *Continental T.V., Inc. v. GTE Sylvania Inc.* [Casebook, *infra* Chapter 4], a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers.* * * *

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition.[26] Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

III

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects.[28] The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.[29] Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive

26. Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. * * *

28. In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. *See* 15 U.S.C. §§ 1291-1295. The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act. * * *

29. "It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. * * * The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the networks or on various local stations. * * *"

market.[30] And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.[31]

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit. At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete. Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.

Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market.[38] We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers*, 435 U.S., at 692.[39] * * * We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.[42]

30. "Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. * * * Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference." * * *

31. Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval. * * *

38. Market power is the ability to raise prices above those that would be charged in a competitive market. * * *

39. "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. * * * The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981). * * *

42. The Solicitor General correctly observes:

> "There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the 'reasonableness' of a particular

As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games. Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. These findings amply support its conclusion that the NCAA possesses market power. Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product. * * *[49] It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. * * *

Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. We turn now to the NCAA's proffered justifications.

IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws * * * a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies." The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling

alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Brief for United States as *Amicus Curiae* 19–20. * * *

49. For the same reasons, it is also apparent that the unique appeal of NCAA football telecasts for viewers means that "from the standpoint of the consumer—whose interests the statute was especially intended to serve," there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers. [The dissent took issue with the majority's conclusion on this point, arguing that the competitive effect of the NCAA's plan should have been judged in a broader "entertainment" market. He also urged the Court to consider the non-economic nature of the NCAA's program of self regulation. 468 U.S. at 131–33 (White, J., dissenting). Eds.]

agent for any school or for any conference of schools. * * * Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music's* blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan. There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music*, 441 U.S., at 23, 99 S.Ct., at 1564. In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint. Here production has been limited, not enhanced. No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors.[55] * * *

V

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which *are* shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.

* * * [T]he District Court found that there was no evidence to support that theory in today's market. Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.

55. If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. Our conclusion concerning the availability of substitutes in Part III, *supra*, forecloses such a justification in this case, however.

There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. * * *

VI

* * *

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. * * * The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament in which all college football teams compete. * * * The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. * * *

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption

will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.

* * *

Affirmed.

[The dissenting opinion of Mr. Justice White, with whom Justice Rehnquist joined, is omitted. Eds.]

Why does the Court in *NCAA* decline to apply the per se rule to the Association's television plan? In applying the rule of reason, how elaborate an inquiry does it make? What factors does it weigh? How does it allocate the burden of proof as between the parties? Why did the plaintiffs prevail? Why was it so readily convinced from that evidence that the television plan was unreasonable? Was it the strength of the plaintiff's evidence? The weakness of the NCAA's defense? These questions have recurred in the NCAA's later encounters with the Sherman Act. *See Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998)(applying rule of reason to conclude that NCAA's limit on compensation of college basketball coaches was unlawful restraint of trade).

Consider as well whether ancillary restraint analysis could be used to explain the Court's approach in *NCAA*, even though the Court did not expressly refer to it. The Court appeared to accept that as a general matter producing collegiate football contests was a legitimate underlying reason for the members of the NCAA to cooperate. In terms of ancillary restraint analysis, would that alone justify removing the television rights issues from treatment under the per se standard? Did the Court then effectively conclude that the television contract was an unreasonable restraint of trade because it was not ancillary and necessary to the legitimate purposes of the more general cooperation among the members of the NCAA?

When approaching arrangements such as those in NCAA that have many components of cooperation, should the courts consider the effects of the various components individually or as a whole? Would application of ancillary restraint analysis clarify whether it should look to the whole or evaluate each individually? What if no single restraint has a very significant impact on competition, but collectively they do? Should all be enjoined? Some?

In footnote 26 the Court says "there is often no bright line separating *per se* from Rule of Reason analysis." Is that proposition inconsistent with the Court's assertion in *Nat'l Soc'y of Prof'l Eng'rs* that Section 1 cases fall into "two categories," per se or rule of reason? What does the Court mean when in footnote 39 it quotes Professor Areeda for the proposition that "the rule of reason can sometimes be applied in the twinkling of an eye"? If that is true, what then distinguishes per se from rule of reason treatment? What implication does the statement have for the cases we have studied to this point in the Chapter? In the Note that follows, we explore the meaning of the Court's various references to abbreviated rule of reason analysis.

companies in the Henan and Shandong provinces who were alleged to have colluded to increase the price of garlic were fined between CNY 80,000 and 100,000 each.[1]

1. NDRC, 'NDRC, MOFCOM and SAIC Announced the Investigation against and Penalties Imposed on Hoarding and Price Collusion of Agricultural Products' (in Chinese)<http://jjs.ndrc.gov.cn/gzdt/t20100702_358457.htm>, 2 Jul. 2010.

B. Market/Client Allocation

219. The AML prohibits the allocation of sales market or raw material procurement market among competing undertakings.[1] The Measures on the Prohibition of Monopoly Agreements further set forth the AML rule on market allocation and prohibits competing undertakings from allocating: (1) sales regions, targets, categories, and volumes; (2) procurement regions, categories, and volumes of raw materials, semi-finished goods, parts and components, and related equipment; and (3) suppliers of raw materials, semi-finished goods, parts and components, and related equipment.[2]

1. AML, Art. 13(3).
2. Measures on the Prohibition of Monopoly Agreements, Art. 5.

220. Concrete manufacturer association penalized for market allocation. It is reported that, in early 2011, the Jiangsu Province Administration for Industry and Commerce, a local arm of SAIC, has penalized the Concrete Manufacturer Association of Lianyungang City for market sharing and fixing market shares. Officials at the Jiangsu Province Administration for Industry and Commerce said that, in March 2009, the association organized for sixteen members to reach several 'self-disciplinary agreements' that were aimed at coordinating competition and monopolizing the market. The association allocated sales markets and units according to its members' capacities and equipment. Until August 2010, the association organized several meetings to discuss the allocation of projects and deterrent mechanisms. The association also obstructed its members' ability to enter into sales agreements with customers, which directly caused the suspension of several local construction projects. The Jiangsu Province Administration for Industry and Commerce found that the association breached the AML and imposed fines of CNY 730723.19 on and confiscated illegal gains of CNY 136481.21 of the association and the relevant parties.[1]

1. Xinhua News Agency, 'Trade Association Allocated Market Share; Jiangsu Completed the First Anti-Monopoly Investigation' (in Chinese), <www.js.xinhua.org/xin_wen_zhong_xin/2011-01/21/content_21923072.htm>, 21 Jan. 2011; Global Competition Review, 'SAIC Takes First Enforcement Steps', <www.globalcompetitionreview.com/news/article/29809/saic-takes-first-enforcement-steps/>, 2 Mar. 2011.

C. Production/Innovation Limitation

221. The AML prohibits the limitation of production, sales, and innovation among competing undertakings.[1] With respect to limitations on production and sales, the Measures on the Prohibition on Monopoly Agreements further provide that competing undertakings are prohibited from: (1) restricting production volumes of products by means such as limiting or fixing production volumes or ceasing production; and (2) restricting sales volumes of products through refusing supply or limiting volumes of products available to the market.[2]

1. AML, Art. 13(2) & (4).
2. Measures on the Prohibition of Monopoly Agreements, Art. 4.

222. With respect to limiting innovation, the Measures on the Prohibition on Monopoly Agreements further provide that competing undertakings are prohibited from: (1) restricting the purchase or use of new technologies or processes; (2) restricting the purchase, lease or use of new equipment; (3) restricting investment or research and development in new technologies, processes or products; (4) refusing to use new technologies, processes or equipment; or (5) refusing to adopt new technical standards.[1]

1. Measures on the Prohibition of Monopoly Agreements, Art. 6.

223. It should also be noted that the Contract Law provides that a technology contract that illegally monopolizes technology or impedes technology development shall be null and void.[1] To date, there have been no reported cases in China regarding monopoly agreements that limit production and innovation. It, therefore, remains to be seen how the limitation on production or innovation will be assessed or treated under the AML and the Contract Law.

1. Contract Law, Art. 329; see a discussion at para. 263 below.

D. Group Boycott

224. The AML prohibits group boycotts.[1] The Measures on the Prohibition of Monopoly Agreements further provide that competing undertakings are prohibited from: (1) jointly refusing to supply or sell products to a particular undertaking; (2) jointly refusing to procure from or sell products of a particular undertaking; or (3) jointly preventing a particular undertaking from conducting business with other competing undertakings.[2]

1. AML, Art. 13(5).
2. Measures on the Prohibition of Monopoly Agreements, Art. 7.

225. To date, there have been no reported cases in China regarding group boycotts. It, therefore, remains to be seen how group boycotts will be assessed and treated under the AML.

E. Collusion on other Objects

226. Bid rigging. Bid rigging is commonly considered to be a type of hard-core cartel. The AML does not expressly prohibit bid rigging; rather it prohibits certain types of horizontal and vertical anticompetitive agreements. However, early drafts of the Measure on the Prohibition of Monopoly Agreements and the Measures on the Prohibition of Price Monopoly expressly prohibited bid rigging.[1] Although the provisions on bid rigging were not ultimately adopted, bid rigging may be construed as a type of monopoly agreement and prohibited pursuant to the catch-all provision under the AML. Prior to the AML, bid rigging was prohibited under the Bidding Law, the AUCL, and the Criminal Law.[2] See paragraph 207 above for a discussion on the bid rigging offence under the Criminal Law.

1. Draft Measures on the Prohibition of Monopoly Agreements (April 2009 version), Art. 6(5); Draft Measures on the Prohibition of Price Monopoly (August 2009 version), Art. 8.
2. Bidding Law, Arts 32 & 53; AUCL, Arts 15 & 27; Criminal Law, Art. 223.

227. It should also be noted that the Draft Bidding Law Implementing Regulations provide further details on the prohibition of bid rigging.[1] In particular, the following activities between rival bidders are prohibited: (1) collusion between bidders in order to raise or reduce the bid price; (2) collusion between bidders to determine the bid winner; (3) joint actions between bidders in order to win the bid or exclude specific bidders; and (4) concerted practices between bidders following instructions from trade associations. According to the Draft Bidding Law Implementing Regulations, the price regulators, namely, the NDRC and its local bureaus, shall punish price-related bid rigging activities.[2]

1. Draft Bidding Law Implementing Regulations, Arts 36, 37 & 76; See Legislative Affairs Office of the State Council, 'Notice on Public Consultation on the Draft Bidding Law Implementing Regulations' (in Chinese), <www.chinalaw.gov.cn/article/cazjgg/200909/20090900140675.shtml>, 30 Sep. 2009.
2. Draft Bidding Law Implementing Regulations, Art. 76.

228. The prohibition of collusion between bidders under the Bidding Law, the AUCL, and the Criminal Law is in line with the generally accepted approach to treat bid rigging as a type of hard-core cartel between competitors. However, it is noteworthy that the prohibition of bid rigging under the Chinese law also covers collusion between bidders and bid-inviters. For example, the AUCL provides that 'bidders shall not act in collusion for bidding in order to raise or reduce the bid price. Bidders shall not collude with bid-inviters in order to eliminate other competitors from fair competition'.[1] In other words, big rigging in China may have both horizontal and vertical characteristics.

1. AUCL, Art. 15.

229. Bid rigging cases penalized pursuant to the AUCL. In 2002, three individuals were convicted of participating in a bid rigging conspiracy with respect to a bid to operate an aqua-farm in the Zhejiang Province. The three individuals met and determined the bid winner and the winning price, and to compensate the losing

bidders, they agreed to operate the aqua-farm together. The bid was invalidated and the respondents were fined CNY 200,000, CNY 100,000, and CNY 50,000 respectively.[1] In another case, twenty-three construction companies were prosecuted for bid rigging on a contract for the construction of a housing project. The companies agreed that one of the construction companies would get the contract in exchange for payments to the other companies, and assigned one of the companies to calculate the bidding prices of all the candidates. The bid was invalidated and the companies involved were fined.[2]

1. State Administration for Industry and Commerce and Chinese Academy of Social Sciences International Law Research Centre, *Selected Anti-Monopoly Cases and Analysis on China's Anti-Monopoly Enforcement* (Chinese version) (Beijing: Law Press, 2007), 132–134.
2. *Ibid.*, 129–132.

230. As discussed in paragraphs 44–46 above, the AML does not expressly repeal competition-related provisions in other laws and regulations. However, conflicting legal norms do exist. For example, different legal liabilities are stipulated for bid rigging pursuant to each of the Bidding Law, the AUCL, and the Criminal Law. No cases on bid rigging have been reported since the AML came into effect. It remains to be seen how the applicable law will be chosen and how bid rigging will be treated in the future.

II. Information Exchange Practices

231. To date, there are no clear rules on information exchange practices among competing undertakings. It can be presumed that where the exchange of information is harmless or beneficial to competition, the practice will not infringe the AML. However, as demonstrated by the Rice Noodle Cartel case discussed in paragraph 217 above, exchanges of sensitive price information as a mechanism for implementing or monitoring a cartel arrangement will be condemned by the AML and other competition-related laws and regulations.

III. Cooperation Agreements

232. To date, the AML and competition provisions in other laws and regulations do not provide clear rules regarding joint ventures and other beneficial horizontal arrangements, such as research and development agreements and specialization agreements. Therefore, it remains to be seen whether cooperation agreements will be addressed specifically in the future.[1]

1. See a discussion on when a joint venture will be construed as a type of concentrations at paras 136–137 above.

233. As discussed in paragraph 235 below, the Contract Law provides that a technology contract that illegally monopolizes technology or impedes technological

and services; (2) fixing or changing the range of price change; (3) fixing or changing fees, discounts or other charges that affect price; (4) setting an agreed price as the basis for transacting with third parties; (5) agreeing to adopt a formula for calculating price; (6) agreeing not to change price without the consent of other undertakings; (7) fixing or changing price in a disguised form by other means; and (8) other price monopoly agreements as determined by the price authority under the State Council."[44]

As discussed above, the AML does not expressly distinguish between "naked" price-fixing agreements and agreements ancillary to a legitimate business purpose, nor does the statute explicitly acknowledge that a "legitimate business justification" may render a monopoly agreement such as a price-fixing agreement lawful. However, it appears that the exemptions of agreements that are undertaken for certain desired purposes, including particularly improving efficiency, may be used to avoid condemnation of many typical types of agreements with a price effect that are ancillary to legitimate business purposes, including such restraints adopted in the context of legitimate joint ventures between competitors that have an overall procompetitive effect, consistent with approaches taken by most other jurisdictions.[45] For naked cartels, recent enforcement by NDRC does not appear to require proof of effect on competition.

Finally, it must be underlined that price-fixing may also violate the Price Law. In particular, Article 14(1) of the Price Law contains a prohibition directed at the same sorts of conduct, but it prohibits "colluding with others in manipulating market prices, thereby harming the lawful rights and interests of other operators or consumers."[46] Most published enforcement cases so far have been taken by local NDRCs under both the Price Law and the AML.

B. Agreements to Restrict Output

The AML's list of prohibited monopoly agreements includes agreements "[r]estricting the output volume or sales volume of the products."[47] The SAIC Rules on the Prohibition of Monopoly Agreements expand on this by prohibiting competing undertakings from entering into "(1) agreements that restrict

44. NDRC Anti–Price Monopoly Rules, art. 7.
45. *See, e.g.*, U.S. Federal Trade Commission and U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors, at § 1.2. (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (agreements that would normally be considered per se illegal are analyzed under the rule of reason to determine their overall competitive effect, "provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity").
46. *See* Chapter 9 for a discussion of the Price Law.
47. AML, art. 13(2).

output of products or certain types or models of a product by curtailing production, fixed production, stop production or otherwise; or (2) agreements that restrict sales volume of products, or certain types or models of a product by refusing to supply, restricting the products supply or otherwise."[48]

Virtually all jurisdictions with competition laws condemn output agreements between competitors that are not ancillary to a legitimate business purpose, regarding them as simply an alternative means to achieve the same goals as a price-fixing agreement, and indeed as often being a more enforceable and effective method to fix prices.[49] This is so because "every output level implies a price and every price implies an output level."[50] "Properly defined, 'naked' output agreements are deemed illegal *per se* under U.S. antitrust law[51] and similarly condemned under EU law as "ancillary to [a] cartel's attempts to raise prices."[52] In China, by contrast, such output agreements are, like all other horizontal agreements under Article 13, analyzed in light of the requirements of Article 13 and the exemptions available in Article 15 to "balanc[e] the benefits against the impact of the restriction on competition."[53]

C. Market Allocation Agreements

Article 13(3) of the AML includes within the list of prohibited monopoly agreements any agreements "dividing the sales market or the raw material purchasing market." The SAIC Rules on the Prohibition of Monopoly Agreements provide that such agreements include "agreements that split the market by territory, customer or product type and volume", that "split purchasing markets of raw materials,[54] semi-finished products, parts,

48. SAIC Rules on the Prohibition of Monopoly Agreements, art. 4.
49. *See* AREEDA & HOVENKAMP, *supra* note 13, ¶ 2006 ("Fixing the 'price' may not always be the best way for colluders to accomplish their goal. If firms simply agree upon a price without restricting output, each firm will tend to produce too much, for sales at the agreed upon price will be highly profitable. It might be far more workable for the firms to agree that each will produce a certain number of units. Depending on the circumstances, production might be easier to verify than prices are.") (citations omitted).
50. E. ELHAUGE & D. GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 106 (Foundation Press 2007).
51. AREEDA & HOVENKAMP, *supra* note 13, ¶ 2006. *See also* NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 99–101 (1984).
52. J. FAULL & A. NIKPAY, *supra* note 13, ¶ 8.28. *See also* TFEU Article 101(1)(b) (prohibiting agreements that "limit or control production, markets, technical development, or investment"); *See also* European Commission Decision 84/405 of Aug. 6, 1984, Zinc Partner Group, OJ [1984] L220/27.
53. *See* Wu Zhenguo, *supra* note 14, at 81.
54. The provision defines "raw materials" as including "any raw material, semi-finished products, parts, components and relevant equipment necessary for the production operations of the undertakings."

components, relevant equipments and other raw materials by territory, type and volume", and that "split suppliers of raw materials, semi-finished products, parts, components, relevant equipments and other raw materials."[55] So-called "naked" market allocation agreements between competitors, i.e., those that are not ancillary to a legitimate business purpose such as an efficiency-enhancing joint venture, are widely regarded as being as pernicious as, or even more pernicious than, price-fixing and output restraints and are accordingly condemned as *per se* violations in most competition law regimes.[56]

D. Agreements to Restrict the Purchase or Development of New Technology or New Facilities

Article 13(4) prohibits monopoly agreements between competitors that restrict "the purchase of new technology or new facilities or the development of new technology or new products." The SAIC Rules on the Prohibition of Monopoly Agreements contemplate that this prohibition will include "(1) agreements that restrict purchasing and using new technologies, new processes; (2) agreements that restrict purchasing, leasing or using new equipments; (3) agreements that restrict investing in and developing new technologies, new process, or new products; (4) agreements that refuse to use new technologies, new process, or new equipments; (5) agreements that refuse to adopt new technical standards."[57] Though in given circumstances,

55. SAIC Rules on the Prohibition of Monopoly Agreements, art. 5.
56. TFEU Article 101(1)(c) (prohibiting agreements that "share markets or sources of supply"); Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) ("The analogy between price-fixing and division of markets is compelling. It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating competition among them, but allowed them to divide markets, thus eliminating all competition among them."); E. ELHAUGE & D. GERADIN, *supra* note 50, at 125 ("Horizontal market divisions can be even more anticompetitive than price-fixing or output-restrictions. They allow cartels to avoid the difficulties of fixing and monitoring prices and output, and allocating market share among the cartel members. The cartel need simply monitor where or to whom firms are selling. Further, market divisions end all forms of competition between the firms, including on quality and service. Thus, unlike price and output restrictions, market divisions cannot be undermined by nonprice competition."); *See also* AREEDA & HOVENKAMP, *supra* note 13, ¶ 2030. (A properly defined "naked" market division agreement is unlawful per se and may take many forms, including agreements that "require participants to refrain from (1) producing one another's products, (2) selling in one another's territories, (3) soliciting or selling to one another's customers, or (4) expanding into a market in which another participant is an actual or potential rival.").
57. SAIC Rules on the Prohibition of Monopoly Agreements, art. 6.

such agreements could have a price effect, the NDRC Anti–Price Monopoly Rules do not include these kinds of agreements in its nonexhaustive list of pricing monopoly agreements, perhaps indicating that such agreements are more likely to fall within SAIC's jurisdiction.

The AML provision appears to be based on the EU's Article 101(1)(b) of the TFEU, which prohibits agreements that "limit or control production, markets, technical development, or investment." In the United States, certain horizontal agreements that affect access to technology have been held to violate Section 1 of the Sherman Act.[58] Many technology-related antitrust issues arise from restrictions in intellectual property (IP) licenses. Though licensing agreements restricting competition unduly are prohibited by Article 101 of the TFEU, the European Commission has recognized that, in most cases, such agreements also have procompetitive benefits that outweigh their anticompetitive effects. The EU has adopted a Technology Transfer Block Exemption that creates a safe harbor where, for example, no party involved has more than 20 percent market share, when the parties are competitors (the threshold is 30 percent when the parties are not competitors).[59] The European Union, United States, and other leading jurisdictions' competition enforcement authorities have promulgated detailed guidelines[60] explaining the approaches of these agencies to their analysis of whether and under what circumstances certain typical license provisions may violate the law.[61]

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58. *See* I H. Hovenkamp, M. D. Janis, & M. A. Lemley, IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property 30-1–36-16 (Aspen Publishers 2005) (discussing the treatment, under Section 1 of: "naked" restraints as contrasted with ancillary restraints such as legitimate joint ventures; price- and output-restricted licenses; horizontal market division in patent licenses, including first sale limitations, territorial restraints, field-of-use restrictions, customer restrictions, exclusive rights extending beyond the IP grant, and agreements restricting further licensees; cross-licensing and patent pools; IP and standard-setting organizations; and research and production joint ventures); *id.*, 7-1–7-51 (discussing allegedly anticompetitive settlements of IP disputes).
59. Commission Reg. (EC) No 772/2204 on the application of TFEU Article 101(3) to categories of technology transfer agreements, OJ L 123, 27.4.2004, *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2004&nu_doc=772 (last visited Mar. 1, 2011).
60. *See* Commission Notice, Guidelines on the Application of TFEU Article 101(3), OJ C 101, 27.4.04, at 97–118, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):EN:HTML; U.S. Dep't of Justice and U.S. Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (Apr. 6, 1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.htm (last visited Mar. 1, 2011).
61. For a general discussion of the treatment of IP licenses under the AML, see Chapter 6 *infra*.

DAY 6, MONDAY, JULY 7, 2014

1. ARTICLES/BOOK CHAPTER EXCERPTS

    1. Horton – A Comparison of Merger Remedies in the U.S. and EU

    2. Horton – The New United States Horizontal Merger Guidelines

    3. AML and Practice in China (pgs. 158-60; 164-66)

    4. Competition Law in China (pgs. 133-34; 137-38)

    5. China's AML Law (pgs. 195-199)

A comparison of merger remedies in the US and the EU

by Thomas J. Horton, Thelen Reid & Priest LLP

In October 2005, the European Commission released its Merger Remedies Study. The EC's findings followed the release of formal merger remedies guides and statements in the US by the Antitrust Division and the Federal Trade Commission, as well as in Canada by the Canadian Competition Bureau. The various regulatory statements emphasise that merger remedies falling short of the divestiture of a viable ongoing business will face increased scrutiny going forward on both sides of the Atlantic Ocean. This article compares the key similarities and differences in the likely future acceptance of merger remedies in Europe and the US.

Competitors seeking to merge in the US and the EU increasingly are utilising structural and conduct remedies to resolve regulatory concerns about the potential anti-competitive impacts of their consolidations. Throughout the last decade, in both the US and Europe, the competition regulatory authorities have welcomed and encouraged creative merger remedies as a reasonable compromise between blocking potentially pro-competitive and efficiency-enhancing mergers and permitting anti-competitive increases in market concentrations.

As the pace and creative scope of merger remedies have increased, regulators and commentators on both continents appropriately have questioned whether such remedies truly are effective in maintaining aggressive competition in consolidating industries. Such concerns have led to formal studies of merger remedies in the US by the Federal Trade Commission ('FTC'), in 1999, and, more recently, in 2005, in Europe by the European Commission ('EC')[1].

In many important respects, the FTC and EC Studies reached parallel conclusions. Overall, both concluded that in a number of cases, merger remedies, especially those including the divestiture of a viable ongoing business, have been successful in resolving anti-competitive concerns and maintaining post-merger competition. On the other hand, both studies also found that a substantial percentage of merger remedies have not achieved their desired objectives for a host of reasons. For example, the EC observed "The key findings of the study are the identification of the different types and frequency of serious design and/or implementation issues affecting unaddressed".[2]

The formal regulatory studies have spurred the competition and antitrust authorities in the US, Canada and Europe to issue statements and guidelines as to how they will evaluate proposed merger remedies going forward.[3]

The good news for merging companies in both the US and Europe, as well as in Canada, is that the regulatory authorities are likely to continue accepting proposed merger remedies as an alternative to blocking the consolidations. The bad news is that the review of proposed remedies falling short of the divestiture of a viable on-going business is likely to be much more stringent, especially in Europe. On both continents, the regulators also are likely to closely monitor and limit any ongoing post-divestiture relationships that 'may increase the vulnerability of the buyers of the divested assets, particularly in those cases in which the divested assets comprise less than an on-going business'.[4]

The FTC and EC Merger Remedies Studies

Both the FTC's 1999 Study and the EC's 2005 Study represent valuable and necessary efforts to objectively assess the competitive success of merger remedies previously approved by the regulators, and to identify particular areas of concern going forward. Overall, both studies concluded that in a majority of cases, the companies acquiring divested assets were able to enter the relevant market and provide ongoing competition. For example, the FTC observed that its "Study supports the view that divestitures have been successful remedies for anti-[5]

Both the FTC and the EC emphasised that the ideal merger remedy includes the divestiture of a viable on-going business. For example, the FTC stated that "divestitures of on-going businesses succeeded at a higher rate than divestitures of selected assets".[7] Similarly, the EC cautioned: "The scope of the divested business determines to a large extent whether this new operator will be viable, capable of being operated independently from the divested parties ('stand-alone') and constitute, in the hands of a suitable purchaser, an effective and lasting competitive force *vis-à-vis* the parties and other competitors".[8]

Based on their findings, both the EC and the FTC studies include substantial and detailed recommendations to expedite and fortify the divestiture process, and to combat potential post-merger strategic behaviour by the sellers of divested assets against the buyers.

Comparative merger remedies

Divestitures of ongoing businesses are favoured in the US, Canada and Europe

Following the studies, the Antitrust Division, the FTC, the CCB, and the EC all have formally stated that the surest way to gain expedited approval of a potentially anti-competitive consolidation is to present the agencies with 'the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market'.[9] For example, the FTC Statement notes "A proposal to divest a demonstrably autonomous, on-going business unit comprising the entire business of one of the parties to the merger will, in all likelihood, expedite the divestiture process".[10]

Similarly, the CCB Information Bulletin admonishes "Divesting a stand-alone functioning business increases certainty that the remedy will be effective since the entity has proven its ability to compete in the market and survive independently". The Bureau applies greater scrutiny to partial divestitures since there is limited or no proven track record that the components of the business will be able to operate effectively and competitively.[11]

Finally, the EC in its Best Practice Guidelines expressly points to the FTC Study's Findings as to "the importance of the divestiture of an on-going business for the success of the remedy", and mandates that "the Divestment Business is considered to be an existing entity that can operate

on a stand-alone basis".[12]

One important difference between the US and Europe going forward may be that the EC may be more demanding than the DOJ or FTC in requiring divestitures exceeding the scope of the overlapping businesses. The EC Study cautioned "that the straightforward approach of divesting solely the overlapping businesses has at times resulted in insufficient consideration of these critical commercial issues pertaining to the key requirement of viability of the divested businesses without which its competitiveness can be seriously impaired".[13] The EC alerted its staff "that acceptance of divesting 'just the overlap' to resolve horizontal competition concerns could be risky if a number of common problems relating to the scope of the divested business were not addressed thereby failing to create a viable competitor".[14]

Conduct remedies and post-merger regulatory oversight are likely to be more acceptable to the EC

A potential major difference between the US and EC competition regulatory authorities' acceptance of future merger remedies may lie in their differing attitudes towards conduct remedies and ongoing relationships between the sellers and purchasers of divested assets. In the US, the DOJ's Guidelines warn that "conduct remedies generally are not favoured in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis, and impose direct, frequently substantial, costs upon the government and the public that structural remedies can avoid".[15]

Both the FTC's Statement and the DOJ's Guidelines emphasise that where conduct relief such as a supply agreement is appropriate, the relief should be "short-term".[16] The DOJ's and FTC's current positions stem from their dual concerns that sellers are likely to engage in strategic behaviour towards the buyers of divested assets, and that the close ties created by such agreements between competitors 'can serve to enhance the flow of information or align incentives that may facilitate collusion or cause the loss of a competitive advantage'.[17]

The EC, on the other hand, is far less concerned about the competitive dangers of ongoing supply or licensing agreements,[18] and more concerned about their actual effectiveness in allowing the asset purchaser to grow into an effective competitor. The be useful in facilitating the effective carve-out of assets between the parties' retained and divested businesses".[19]

Unlike the DOJ and the FTC, which are wary of potential ongoing regulatory entanglements, the EC appears to be much more willing to play an intensive post-merger oversight role. The EC's Study "found that the Commission could neither rely solely on market forces during the divestiture process, nor on the purchaser, to steer the carve-out process in a way that would ensure an adequate competition outcome".[20] Consequently, the EC finds it 'desirable' that 'monitoring trustees are appointed in all divestiture remedies'.[21]

Additional potential differences

A number of additional potential differences in the treatment and acceptance of merger remedies in the US and Europe beyond the scope of this article may exist going forward. For instance, the EC is more likely to order 'crown jewel' divestitures than its American regulatory counterparts.[22] Additionally, the EC may prefer to receive divestiture packages that are attractive "to as many 'suitable purchasers' as possible [ ] at the design stage," and is likely to play an assertive role in the ultimate selection of a purchaser. The American authorities, on the other hand, are more likely to prefer the early identification of a single upfront buyer.[23] A potential wild card may be the recent ability of merging parties in the US to seek judicial approval for their proposed merger remedies in federal district courts.[24]

Notes:

1 See 'Staff of the Bureau of Competition, Federal Trade Commission, A Study of the Commission's Divestiture Process' (1999)('FTC Study'); and 'Merger Remedies Study' (public version), DG Comp, European Commission (October 2005)('EC Study').

2 EC Study, at 139.

3 See 'Antitrust Division Policy Guide to Merger Remedies' (October 2004)('DOJ Guide')(available at www.usdoj.gov/atr/public/guidelines/205108.htm); 'Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies' ('FTC Statement')(available at www.ftc.gov/bc/bestpractices/bestpractices030401.htm);'Canadian Competition Bureau' ('CCB')

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The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?

Thomas J. Horton*

* Assistant Professor and Director of Trial Advocacy, The University of South Dakota School of Law. Prior to becoming a full-time professor in 2009, Prof. Horton spent 28 years as an antitrust trial attorney with the DoJ's Antitrust Division and the Federal Trade Commission, and as a partner with several major international law firms, including Howrey & Simon and Orrick, Herrington & Sutcliffe.

Abstract

This article reviews the new Horizontal Merger Guidelines released on August 19, 2010, by the United States Department of Justice, through its Antitrust Division, and the Federal Trade Commission. The United States' New Horizontal Merger Guidelines converge towards and closely mimic their European counterparts. Indeed, the New Guidelines differ dramatically from their 1992 predecessors, and signal an American competition theory counterrevolution. First, they reveal a commitment towards more aggressive horizontal merger enforcement driven by a renewed emphasis on the incipiency standard. Second, they set out a less formulaic and rigid review methodology, which the Agencies hope will prove to be more litigation friendly, as they pursue enforcement cases in American courts. And third, they indicate heightened concerns about potential unilateral effects, including exclusionary conduct, and impacts on non-price competition such as quality, variety, and innovation. When the New Guidelines are systematically compared side by side to the EC's, the resemblances are striking. Indeed, the New Guidelines more closely resemble the EC's than they do their 1992 predecessors. It can be fairly concluded that the New Guidelines' drafters were heavily influenced by, and paid close attention to, the EC's guidelines. However, it is unclear whether the New Guidelines will survive a conservative administration, or how they will be accepted and interpreted by the American courts.

National and International Developments

The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?

Thomas J. [redacted]*

Legal Context

On 19 August 2010, the United States Department of Justice (DoJ), through its Antitrust Division, and the Federal Trade Commission (FTC), released comprehensive revisions (the 'New Guidelines') to their 1992 Horizontal Merger Guidelines (the '1992 Guidelines'), which had last been revised in April of 1997.[1] The ostensible purpose of the New Guidelines is simply to 'outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under [America's] Federal antitrust laws.' As discussed herein, however, the New Guidelines portend a potentially dramatic and perhaps even counterrevolutionary shift in the enforcement visions and goals of the current Agencies, and a pronounced convergence towards the EC's Guidelines on the assessment of horizontal mergers.[2]

Key Points

- The United States' new horizontal merger guidelines converge towards and closely mimic their European counterparts.
- The New Guidelines differ dramatically from their 1992 predecessors, and signal an American competition theory counterrevolution.
- It is unclear whether the New Guidelines will survive a conservative administration, or how they will be accepted and interpreted by the American courts.

I. Substantial material changes

The New Guidelines promulgate three sets of fairly dramatic changes from their 1992 predecessors. First, they signal a commitment towards more aggressive horizontal merger enforcement driven by a renewed emphasis on the Clayton Act's incipiency standard. Secondly, they set out a less formulaic and rigid review methodology, which the Agencies hope will prove to be more litigation-friendly, as they pursue enforcement cases in the US courts. And thirdly, they indicate heightened concerns about potential unilateral effects, including exclusionary conduct, and impacts on non-price competition such as quality, variety, and innovation.

A. Commitment toward more aggressive enforcement

In the USA, the competitive effects of mergers and acquisitions are principally governed by Section 7 of the Clayton Act, 15 USC § 18. The Clayton Act was enacted by Congress in 1914, along with the Federal Trade Commission Act, as part of the nation's Progressive Era reforms. Section 7 of the Clayton Act prohibits mergers and acquisitions 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'

Experienced competition and merger lawyers will quickly perceive that the most important change in the

* Assistant Professor and Director of Trial Advocacy, The University of South Dakota School of Law. Prior to becoming a full-time professor in 2009, Prof. Horton spent 28 years as an antitrust trial attorney with the DoJ's Antitrust Division and the Federal Trade Commission, and as a partner with several major international law firms, including Howrey & Simon and Orrick, Herrington & Sutcliffe.

1 The New Guidelines may be found at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

2 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (EC Guidelines), 2004/C 31/03.

New Guidelines is their aggressive pro-enforcement tone. The earlier Guidelines were designed to subtly control and slow down aggressive merger enforcement by the government Agencies. The New Guidelines, however, quite visibly signal ~~on~~ an intent to reverse that laissez-faire trend, which began under President Reagan in the 1980s.

First and foremost, the New Guidelines boldly state in the second paragraph of their Overview that: 'these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency, and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.' Similarly, in the second paragraph of section 7.1 (Impact of Merger on Coordinated Interaction), the New Guidelines emphasize that '[p]ursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.' Lest one contend that such statements hardly portend dramatic change, he or she would be wise to search for the word 'incipiency'[3] in the 1992 Guidelines, or for any indication that 'certainty about anticompetitive effect is seldom possible and not required . . .'

Furthermore, perhaps as a rebuke to recent court decisions and language in Section 0.1 of the 1992 Guidelines that the government must prove that a merger '*is likely* substantially to lessen competition', the New Guidelines elevate from a footnote to the body of their first paragraph the actual Clayton Section 7 standard prohibiting mergers where 'the effect of such acquisition *may* be substantially to lessen competition, or to tend to create a monopoly'. To further emphasize this shift, the New Guidelines subtly change the operative language in the first sentence under 'Evidence of Adverse Competitive Effects' to '[t]he Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger *may substantially lessen competition*'.

More subtly, the New Guidelines delete much of the 1992 Guidelines' pro-merger rhetoric, including their bold pronouncement that '[m]ergers are motivated by the prospects of financial gains'. The New Guidelines also substantially tone down pro-merger rhetoric in the early Efficiencies paragraphs of the 1992 Guidelines. Read together, these changes reveal a determination and commitment to more aggressively enforce Section 7 of the Clayton Act against horizontal mergers by emphasizing the original incipiency standard.

B. Adopting a less formulaic and more litigation-friendly approach

The 1992 Guidelines were adopted to state as 'simply and clearly as possible' a merger 'policy' and 'analytical framework' that would 'reduce the uncertainty associated with the enforcement of the antitrust laws in this area'. The 1992 Guidelines then laid down a mechanical five-step review process designed to curtail and limit the Agencies' discretion and ultimate aggressiveness.

The New Guidelines unabashedly reject and reverse the 1992 Guidelines' mechanistic formalism. For example, in the fourth paragraph of their Overview, the New Guidelines warn that '[t]hese Guidelines shall be read with the awareness that merger analysis does not consist of uniform application of a single methodology'. This point was further highlighted by Assistant Attorney General Christine Varney in a speech on 21 September 2010, at Georgetown University in Washington, DC, where she observed that the New Guidelines include 'a significant softening of the emphasis in the 1992 Guidelines on the sequential nature of merger review'.[4]

Rather than seeking to 'articulate the analytical framework the Agencies apply' in reviewing a merger, as set forth in the 1992 Guidelines, the New Guidelines are designed to 'assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions'. Even more importantly, the New Guidelines aspire to 'assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context'. In other words, they are designed to be litigation-friendly towards the Agencies with the ultimate unstated objective of helping the Agencies reverse a series of adverse court decisions on key merger issues, including most notably on market definition issues.[5]

3 Ironically, the word incipiency appears in the 1992 Guidelines in section 3.0 (Entry Analysis Overview) touting that 'such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.' One cannot but help believe that the neo-conservative drafters of the 1992 Guidelines saw their ironic use of the incipiency standard as a tongue in cheek bite at liberal enforcement standards.

4 29 September 2010 Speech of Christine Varney, available at <http://newsroom-magazine.com/2010/international/antitrust-enforcement-going-global/print/>

5 See e.g., *FTC v Arch Coal, Inc.*, 329 F.Supp.2d 109 (DDC 2004); and *United States v Oracle, Inc.*, 331 F.Supp.2d 1098 (ND Cal. 2004).

1. Product market issues

The biggest sea change appears in the Guidelines' new discussion of the mechanics and legal significance of product market determinations. In the 1992 Guidelines, section 1 covered 'Market Definition, Measurement, and Concentration'. The New Guidelines, on the other hand, do not reach the issue of 'Market Definition' until section 5, or the issues of 'Market Participants, Market Shares, and Market Concentration' until section 6. Under the 1992 Guidelines, 'the analytic process described ensure[d] that the Agency evaluate[d] the likely competitive impact of a merger within the context of economically meaningful markets—i.e., markets that could be subject to the exercise of market power.' In the New Guidelines, however, the 'measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.' Critically, under the New Guidelines, the 'Agencies' analysis need not start with market definition' (New Guidelines, Section 4).

Section 4 of the New Guidelines adds several other important caveats. First, '[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.' Secondly, '[w]here analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.' Perhaps most importantly, however, they dramatically add without legal citation that '[r]elevant markets need not have precise metes and bounds'. Such thinking represents a tectonic shift from the Old Guidelines' initial pronouncement in the first paragraph of their Market Overview that 'mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis' (1992 Guidelines, Section 1.0).

The New Guidelines maintain the hypothetical monopolist SSNIP market definition test prominent in the Old Guidelines. However, the New Guidelines' overall approach to market determination is much more evidentiary-based than formulaic. The New Guidelines change both the language and evidentiary-standard for judging 'customers' likely responses to higher prices' from 'relevant evidence' to 'reasonably available and reliable evidence' (New Guidelines, Section 4.1.3). The New Guidelines also substantially expand the types of potentially useful evidence set forth as examples, including adding surveys of buyers, objective evidence about product characteristics, 'evidence from other industry participants, such as sellers of complementary products', and legal or regulatory requirements. They also insert the notable new caveat that the 'Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.'

Somewhat surprisingly, and perhaps deferring to their economists, the Agencies add that '[w]hen the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates influences drawn from the evidence noted above.' Although the ultimate practical significance of this addition may be debatable, it provides another indication that the Agencies believe that they should be accorded wide discretion and latitude in alleging and proving relevant product markets.

2. Market concentration issues

Both the 1992 and the New Guidelines view market concentration as a 'useful indicator of the likely [potential] competitive effects of a merger' (1992 Guidelines, Section 1.51; New Guidelines, Section 5.3). Both also continue to assess market concentration by using the Herfindal-Hirschman Index (HHI), a mathematical formula which calculates concentration 'by summing the squares of the individual shares of all the participants' (1992 Guidelines, Section 1.5). Ironically, the New Guidelines actually set higher thresholds for: (1) unconcentrated markets (HHI below 1500 versus below 1000); (2) moderately concentrated markets (HHI between 1500 and 2500 versus 1000 and 1800); and (3) highly concentrated (HHI above 2500 versus above 1800). These new higher thresholds, however, are unlikely to be substantially significant in actual practice, since the Agencies are likely to bring cases only at higher threshold levels, as they historically have done. Furthermore, consistent with their aim of promoting flexibility and being litigation-friendly, the New Guidelines add the caveat that the 'purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide *one way* to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration.'

3. Entry issues

'Entry analysis' is the third step in the 1992 Guidelines' five-step mechanical and formulaic analytical process. By contrast, 'entry' is not raised in the New Guidelines until Section 9. Unlike the 1992 Guidelines, the New Guidelines start out by observing that: '[t]he Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult' (New Guidelines, Section 9). The New Guidelines further warn that 'the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.'

Like the 1992 Guidelines, the New Guidelines contain standards relating to the timeliness, likelihood, and sufficiency of entry. However, consistent with their overall objective of being litigation-friendly, the New Guidelines' sections on each of these parameters are less mechanical and more demanding of reliable evidence than their 1992 Guidelines' counterparts. For example, the 1992 Guidelines on 'Timeliness of Entry' state that the 'Agency generally will consider timely only those committed entry alternatives that can be achieved within two years' (Section 3.2). Discarding the two-year standard, the New Guidelines state that '[i]n order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects . . .' The New Guidelines add that the 'Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices' (New Guidelines, Section 9.1).

Similarly, on 'sufficiency of entry', the 1992 Guidelines began by pro-actively stating that '[i]nasmuch as multiple entry generally is possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern when entry is likely under the analysis of Section 3.3' (Section 3.4). Starting from the other end of the spectrum, the New Guidelines first warn that 'even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern' (New Guidelines, Section 9.3). The New Guidelines then provide several examples of situations where 'entry may be insufficient'.

Finally, further eschewing the mechanical and formulaic entry analysis of the 1992 Guidelines, the New Guidelines emphasize that the Agencies will flexibly look at a broad range of evidence. Even more importantly, the Agencies are not required to provide detailed proof for their findings. Instead, following their litigation-friendly lodestar, they announce:

> In assessing whether entry will be timely, likely and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency. (New Guidelines, Section 9).

Taken together, the New Guidelines' liberalized approaches to analysing product markets, market concentration, and entry issues signal a less formulaic and more flexible review methodology, which the Agencies hope will prove to be more litigation-friendly in their federal court challenges to horizontal mergers.

C. Heightened concerns about potential unilateral conduct and impacts on non-price competition

In terms of substantial theoretical and philosophical changes in enforcement priorities, the New Guidelines signal heightened concerns about potential anticompetitive unilateral effects including exclusionary conduct, and potential impacts on non-price competition such as quality, variety, and innovation.

1. Unilateral conduct

During the last several decades, the analysis of the potential competitive effects of mergers generally has coalesced around 'conditions conducive to reaching terms of [competitive] coordination' (1992 Guidelines, Section 2.11). While the 1992 Guidelines also addressed the potential 'lessening of competition through unilateral effects' (1992 Guidelines, Section 2.2), their formulaic and mechanistic methodology were applied infrequently in practice.

The New Guidelines unequivocally reveal an intent to more aggressively pursue potential anticompetitive unilateral effects analyses and theories. The clearest signal may come from the New Guidelines' notable shift of the discussion of unilateral effects to a separate section (Section 6), which has been moved ahead of the discussion of coordinated effects (Section 7). That signal is accented by subtly adding the verb 'entrench' in the introductory statement of Section 1: 'The unifying theme of these Guidelines is that mergers should

not be permitted to create, enhance, or *entrench* market power or to facilitate its exercise.' The New Guidelines additionally have removed without apology the 1992 Guidelines' 35 per cent market share safe harbour for potential unilateral effects, and have added a significantly expanded discussion as to how the Agencies may analyse unilateral effects.

The New Guidelines first present in Section 6 a bold and streamlined definition of unilateral effects: 'The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition.' Leveraging their earlier emphasis on the reduced role of precise market definitions in merger analyses, the New Guidelines emphasize that:

> The agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. (New Guidelines, Section 6.1).

The New Guidelines do not stop at such a broad recitation of possible evidence. Instead, again pursuing their litigation-friendly agenda, they additionally present a detailed discussion of several creative types of economic evidence and analyses that the Agencies may rely upon, including diversion ratios, and '[w]here sufficient data are available, . . . economic models designed to quantify the unilateral price effects resulting from the merger.' Almost brazenly, the New Guidelines add in Section 6.1 that '[d]iagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration'; and that the 'merger simulation methods need not rely on market definition'. They also include a new Section 6.2 on industries involving 'bargaining and auctions'.

Somewhat ominously, in their unilateral effects introduction, the New Guidelines cryptically add without discussion that 'exclusionary unilateral effects also can arise'. This follows a strong statement in Section 1 of the New Guidelines that '[e]nhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct'. The 1992 Guidelines, by contrast, studiously avoided any meaningful discussion of possible exclusionary conduct. The New Guidelines' cryptic warning seems consistent with Assistant Attorney General Varney's vow in 2009 to increase the scrutiny of exclusionary practices by dominant firms and her well-publicized withdrawal of the DoJ's 2008 report on 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act'.[6] In any case, taken as a whole, the newly elevated and expanded unilateral effects section of the Guidelines indicates a strong intent to aggressively pursue more unilateral conduct and effects theories in horizontal merger cases going forward.

2. Non-price competition

Another heightened area of concern highlighted in the New Guidelines is 'non-price terms and conditions that adversely effect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation' (New Guidelines, Section 1). Section 1 notes that '[w]hen the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.'

Building on this, Section 6.4 of the unilateral effects section lays out detailed guidelines concerning 'innovation and product variety'. Reorienting the 1992 Guidelines' single-minded obsession with pricing competition,[7] the New Guidelines state in Section 6.4 that the 'Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger.' The New Guidelines add that curtailed innovation could take the form of reduced incentives to continue with existing product-development efforts or the development of new products. Following this discussion, astute counsel representing merging parties before the Agencies would be well-counselled to discuss the potential pro-competitive benefits of their merger not just in terms of lower prices, but enhanced quality, innovation, service, or variety, as well.

Key issues

The New Guidelines raise three key issues. First, can they survive a conservative American administration? Second, how will the American courts react to and

6 See Christine Varney, 'Vigorous Antitrust Enforcement In This Challenging Era', 11 May 2009.

7 The 1992 Guidelines' discussion of non-price competition was relegated to footnote 6 of their Overview, which stated: 'Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.'

interpret them? And third, what will be their likely impact on European competition practice?

1. Can the New Guidelines survive?

Chicago School of Antitrust conservatives, whose views have been ascendant over the last three decades, are likely to view the current move to less formal and mechanical guidelines as devolutionary rather than evolutionary. For example, conservative economist Jerry Hausman quickly criticized the 'significant shortcoming[s] of the 2010 Guidelines approach'.[8] Even more drastically, however, many conservatives are likely to see the New Guidelines as an aggressive counterrevolutionary attempt to overthrow and reverse the gains they have made over the last three decades in influencing American and global competition policies. Should they regain power in 2012, American conservatives, therefore, are likely to seek to substantially modify or even jettison the New Guidelines.

2. How will the courts interpret the New Guidelines?

The New Guidelines are not law and the American courts are not therefore bound to follow or defer to them. Consequently, a key question is how deferential the courts will be to the Agencies' attempts to introduce more flexible and litigation-friendly standards and approaches.

Although the courts frequently have sought to follow the 1992 Guidelines, given the extreme conservatism of the current Supreme Court and many lower courts on antitrust issues, the New Guidelines may receive a chilly and even hostile judicial reception in the near term. This may prove to be especially so in cases where the Agencies seek to downplay traditional market definition issues. Indeed, in a recent decision in the Southern District of New York, a district court judge rejected a plaintiff's request to amend its complaint to include the upper pricing pressure test, which appears in the New Guidelines.[9] The court expressed substantial scepticism about using such a test in lieu of more traditional market definition analyses.

Likely impact on European competition practice

European Commission (EC) competition authorities and practitioners are likely to view the New Guidelines positively, and welcome them as a bold step by the American Agencies to bring their own horizontal merger policies closer to the EC's. In 2002, Dr Stefan Schmitz and this author predicted that '[t]hanks to the European Commission and several European States that follow the ECMR, ... the Antitrust Division and the FTC either will become more responsive to the new wave of economic liberalism in future antitrust enforcement effects, or risk losing their historical positions as the leaders of worldwide antitrust enforcement effects.'[10] Viewed from a lofty perspective, the New Guidelines represent a substantial progressive step by the American Agencies towards convergence with Europe on horizontal merger issues.

When the New Guidelines are systematically compared side by side to the EC's, the resemblances are striking. Indeed, the New Guidelines more closely resemble the EC's in many respects than they do their 1992 predecessors. When one further notes that AAG Christine Varney coupled her remarks introducing the New Guidelines with a lengthy discussion of the International Competition Network's (ICN) core goals of cooperation, convergence, and transparency, one can fairly conclude that the New Guidelines' drafters were heavily influenced by, and paid close attention to, the EC's Guidelines on the assessment of horizontal mergers.

First, and perhaps most importantly, the New Guidelines closely mimic their EC counterparts in seeking to establish a less rigid and more flexible analytical process. By way of example, para. 13 of the EC Guidelines' Overview emphasizes: 'It should be stressed that these factors are not a "checklist" to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment ...' The New Guidelines' Overview similarly observes:

> These guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence ...

8 Jerry Hausman, '2010 Merger Guidelines: Empirical Analysis', <www.antitrustsource.com> last accessed October 2010), at 2. In fairness, Dr Hausman described the New Guidelines' 'analysis of unilateral effects ... [as] a significant advance over the 1992 Guidelines.' '2010 Merger Guidelines', at 1.

9 *New York v Group Health, Inc.*, 2010 US Dist. LEXIS 60196, No. 06-Civ. 13122 (SDNY 11 May 2010).

10 Thomas J. Horton and Dr Stefan Schmitz, 'A Tale of Two Continents: The Coming Clash of the Conflicting Economic Viewpoints in Europe and the United States' (Spring 2002) 2 (1) ABA Section of Antitrust Law Economics Committee Newsletter 21, 24.

Both sets of guidelines also emphasize the predictive nature of blocking anticompetitive effects in their incipiency. The second paragraph of the New Guidelines' Overview, for instance, highlights that '[m]ost merger analysis is necessarily predictive . . .' This language closely parallels the language in para. 9 of the EC's Overview.

As one turns to the respective substantive sections, one can see that in section after section, the New Guidelines have converged towards the EC's. For example, the New Guidelines follow the EC's in moving unilateral or non-coordinated effects in front of coordinated effects. The New Guidelines' unilateral effects sections also substantially resemble their EC counterpart's. To illustrate, Section 6.2 on 'bargaining and auctions' mirrors para. 31 on 'customers have limited possibilities of switching suppliers'. Section 6.3 on 'capacity and output for homogenous products' parallels paras 32 et seq. on 'competitors are unlikely to increase supply if prices increase'. And Section 6.4 on 'innovation and product variety' follows paras 37 and 38 on the 'merger eliminates an important competitive force'.

Similar results can be seen when comparing the respective coordinated effects sections. For example, a number of the points discussed in Section 7.2 of the New Guidelines closely track paras 49 through 57 of the EC's. The New Guidelines' treatment of 'powerful buyers' in Section 8 and 'mergers of competing buyers' in Section 12 also parallel the EC's guidelines on 'mergers creating or strengthening buyer power in upstream markets' and 'countervailing buyer power'.

Of course, the New Guidelines and the EC's include various differences. For example, the New Guidelines set the HHI for 'highly concentrated markets' above 2,500 (Section 5.3), while the EC's set it at 2000 (para. 20). However, such minor differences actually emphasize and highlight how remarkably similar the two sets now are. Indeed, it is fair to conclude that the New Guidelines are patterned from and closely resemble the EC's in most material respects.

Conclusion

The New Horizontal Merger Guidelines substantially mimic the EC's, and differ dramatically from their 1992 predecessors. Importantly, they signal a brewing American counterrevolution against many of the currently ascendant Chicago School of Antitrust theories, which heavily influenced the 1992 Guidelines, but have not been readily accepted in Europe.

European competition authorities and practitioners should take great pride in the American Agencies' formal decision to converge towards the EC's horizontal merger guidelines. It seems that America is coming more and more to realize, in the words of DoJ special adviser for international competition matters, Rachel Brandenburger, that '[i]n today's multi-polar world, no one entity or individual, whether public, private, or academic, has a monopoly on good ideas.'[11] Lest one get too excited, however, it would be wise to keep a close eye on developments concerning the acceptance and interpretation of the New Guidelines by American courts and future administrations. In the short term, however, given the recent conservatism of some European judicial decisions concerning horizontal mergers, one must wonder whether one ironic result of the American Agencies' convergence toward the EC's guidelines might be a reverse-GM/Honeywell situation,[12] where the European authorities approve a major international merger, which ultimately is blocked in the USA.

doi:10.1093/jeclap/lpr005

11 Rachel Brandenburger, 'Transatlantic Antitrust: Past and Present Remarks as Prepared for St. Gallen International Competition Law Forum' (21 May 2010) Journal of European Competition Law & Practice 6.

12 See European Commission, Case COMP/M. 2220, General Electric/Honeywell.

C. Theories of Anticompetitive Effects

The AML requires MOFCOM to consider the following factors during merger review:[136]

- the market shares of the undertakings involved in the relevant markets and their abilities to control those markets;
- the degrees of market concentration in the relevant markets;
- the effects of the proposed transaction on market entry and technological progress;
- the effects of the proposed transaction on consumers and other undertakings;
- the effects of the proposed transaction on national economic development; and
- other factors affecting market competition as determined by MOFCOM.

Some of these factors appear to address issues that are not related to the assessment of competitive effects from the proposed transaction and are not typical parts of merger analysis in leading antitrust jurisdictions: in particular the effects of the proposed transaction on "other undertakings" (which is read by many to include competitors)[137] or "national economic development."[138]

The only MOFCOM analyses of such criteria to date are found in the seven public merger decisions and some additional public comments made by MOFCOM officials. As described below, those decisions appear to consider factors consistent with the above AML list, as well as with those considered by enforcers in other jurisdictions, but their conclusory nature means that it is difficult for outside observers to assess the decisions in detail.[139]

Although MOFCOM is understood to be drafting detailed merger review guidelines along the lines of the U.S. and EC guidelines,[140] none has been publicly released for review and comment. MOFCOM appears to rely on and

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136. *See* AML, art. 27.
137. By contrast, U.S. case law makes a distinction between protecting consumers—which is the purpose of competition law—and protecting competitors. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993). ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.")
138. *See e.g.*, Christopher Hamp-Lyons, *supra* note 29, 1584–85 (for EU and U.S. regulators, "broader issues such as the effect of mergers on overall economic development or on competing suppliers are not part of either jurisdiction's antitrust merger analysis.").
139. *See supra.*
140. U.S. Horizontal Merger Guidelines; Commission Notice—Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (EC Horizontal Merger Review Guidelines), DG COMP, Jan. 28, 2004,

regularly quotes the general factors in Article 27 of the AML in its merger review decisions. It remains relatively difficult for parties to a potential transaction to ascertain the factors, legal reasoning, or analysis and likely outcome of Chinese merger review.

The seven published decisions are:

InBev. In *InBev–Anheuser-Busch*, its first published merger decision, MOFCOM approved the transaction after imposing certain postmerger conditions restricting *InBev* from acquiring additional shares in certain domestic competitors. Although the *InBev* decision does not provide much analysis, a MOFCOM press release revealed some further details of MOFCOM's reasoning: "the results of the [InBev] review show that this transaction does not result in eliminating or restricting effect on competition in the beer market in China; therefore MOFCOM decided not to prohibit the transaction. However, in order to prevent the formation of a structure that impairs competition after the transaction, MOFCOM imposed necessary restrictive conditions."[141] Essentially, MOFCOM appears to have conceded that it found insufficient anticompetitive effects arising from the transaction itself, but imposed conditions to prevent undefined future problems rather than leaving them for future merger reviews or enforcement by other sister AMEAs.[142]

Coca-Cola. In *Coca-Cola–Huiyuan*, MOFCOM issued its first and to date only denial of a proposed transaction. MOFCOM determined three principal anticompetitive effects. First, acquiring Huiyuan would enable Coca-Cola to leverage its dominance in the carbonated soft drinks market into the juice beverage market. Second, Coca-Cola's control over the juice beverage market would be strengthened by adding another well-known juice brand, Huiyuan, to its existing Minute Maid brand; this when added to Coca-Cola's soft drinks market position would raise barriers to entry in the juice beverage market.[143] Third, the proposed transaction would harm smaller domestic

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available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205%2802%29:EN:NOT (last visited Mar. 9, 2011).

141. Q&A Regarding Issues in Anti-Monopoly Reviews of Concentrations of Undertakings with Mr. Shang Ming, Director General of Anti-Monopoly Bureau of MOFCOM, Nov. 21, 2008, *available in Chinese at* http://www.mofcom.gov.cn/aarticle/ae/ai/200811/20081105906777.html (last visited Mar. 8, 2011).

142. Any enforcement against future anticompetitive conduct by InBev would be left to either the NDRC or SAIC. Such a preemptive structural remedy in a merger decision would appear to be highly unusual if not unprecedented in merger decisions in other major antitrust jurisdictions. Under EU law, remedies are proposed by the parties in order to eliminate the Commission's doubts about the compatibility of a concentration with competition law. However, the Commission has no power to impose commitments on the parties without their consent.

143. Two commentators on this decision noted that a provision in the Foreign M&A Rules protecting famous domestic brands would not have been applicable to *Huiyuan* because, although essentially a Chinese business, Huiyuan is a Hong Kong–listed company and

juice manufacturers, prevent local manufacturers from competing, and diminish innovation in these markets.[144] According to MOFCOM, the result of these would be to reduce competition in and undermine the "sustained sound development" of the Chinese juice beverage market.[145] The decision did not clearly indicate whose burden—the parties' or MOFCOM's—it is to prove dominant position and anticompetitive effect, although it appears from the published MOFCOM decisions that the burdens of proof may rest with the parties to rebut MOFCOM's theory of harm to competition.[146]

Lucite. In *Mitsubishi Rayon–Lucite*, MOFCOM also conditionally approved the transaction. The decision found that the proposed transaction was likely to adversely affect competition in the Methyl methacrylate (MMA) market in China, because the parties would have a significant combined market share post-transaction—64 percent—far higher than the shares of the next two largest competitors in China. Using that dominant position, Mitsubishi Rayon would be able to eliminate or restrict other competitors in the China MMA market. MOFCOM also noted that Mitsubishi Rayon is active in two downstream markets: polymethyl methacrylate (PMMA) particle and panel products. MOFCOM concluded that, post-closing, Mitsubishi Rayon would be able to foreclose downstream competitors by taking advantage of its dominant position in the upstream MMA market.

General Motors. In *GM-Delphi*, MOFCOM's analysis mainly focused on concerns about vertical effects without any suggestion that the transaction

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thus technically a foreign company in China. *See* Nathan Bush & Zhaofeng Zhou, *supra* note 35, at 10.

144. In contrast to the antitrust laws of some other jurisdictions, Article 27 of the AML expressly requires MOFCOM to consider the effect of a proposed transaction on, *inter alia*, "other undertakings" (which is interpreted to include customers, suppliers, and competitors) and "national economic development." *See* AML, art. 27.

145. The decision sparked widespread speculation that it was driven by domestic economic policy rather than actual competition concerns. *See, e.g., Hard to Swallow*, THE ECONOMIST, Mar. 19, 2009, *cited in* MARK FURSE, *supra* note 18, 110 n.37; MARK WILLIAMS, *supra* note 13, 153 ("Protection for small and medium-sized domestic competitors does appear to have been an objective of MOFCOM [in the *Coca-Cola* decision] as does 'industrial policy' considerations, neither of which conventionally form a legitimate basis to prohibit a merger in most jurisdictions. Concerns over foreign growth in the domestic market or foreign acquisition of an iconic domestic brand name do not form part of the rationale of the decision. But, given the political furor over the transaction, it would be surprising if officials did not have these matters in mind when considering their decision. In fact, it has been speculated that the AML-MOFCOM Unit may well have been required to follow instructions from more senior officials, given the politically-sensitive nature of the transactions and the potential effect it would have on foreign investor confidence.").

146. In contrast, the PRC courts recently dismissed two abuse of dominance cases because of the plaintiffs' failure to adequately support with evidence their assertions of dominant market position, as discussed in Chapter 3 of this treatise. In other jurisdictions, most notably the United States and the European Union, reviewing agencies bear some burden of proof in relation to the substantive grounds for their merger control decisions.

D. Procompetitive Effects and Efficiencies

According to the AML, MOFCOM "may decide not to prohibit the concentration if the undertakings involved can prove either that the positive effect of the concentration on competition obviously outweighs the negative effect, or that the concentration is in the public interest."[151] The seven published merger decisions so far have not indicated MOFCOM's reliance upon or consideration of any efficiency or public interest arguments raised by the transaction parties or any third-party participants. Some commentators, however, have raised concerns about whether this provision may be used to favor consolidation among Chinese companies (and especially state-owned ones) while not being applied to the benefit of foreign companies.[152]

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decisions—*Coca-Cola*—has been a rejection so far, and even in that case MOFCOM's decision appears to hint that it had been open to more aggressive remedies proposals from the parties. On the other hand, it appears that some transactions have been withdrawn to avoid final rejection decisions, possibly in part due to reasons other than competition issues.

151. *See* AML, art. 28. Although such language is not unusual in merger control regimes around the world, there is some question about whether this ultimately serves the interests of competition: "The inclusion of multiple objectives . . . increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and compromise, and adversely affect one of the major benefits of the competitive process, namely economic efficiency." OECD, The Objectives of Competition Law and Policy, CCNM GF/COMP (2003) 3, *available at* http://www.oecd.org/dataoecd/57/39/2486329.pdf (last visited Mar. 9, 2010).

152. *See, e.g.*, Mark Williams, *supra* note 13, 139 ("this discretionary provision [article 28] allows Chinese authorities substantial leverage when making controversial decisions concerning purely domestic mergers, acquisitions of Chinese businesses by foreign undertakings, and business turnovers between two foreign undertakings that qualify the transactions for notification."); Mark Furse, *supra* note 18, 102, 106 ("It may also be expected that it will be harder for parties to a purely 'foreign merger,' with the requisite turnover and market impact in China, to argue that the second test [that the concentration is in the public interest, under article 28 of the AML] is met than will be the case in respect of mergers between Chinese parties."). Note however that under Chapter 4 of the AML the "public interest" only may be considered as a reason *in favor* of a reviewed transaction and not as a reason *against* such a transaction that can support rejection. Professor Furse notes similar concerns about the various factors MOFCOM must consider under Article 27, arguing that, for example, consideration of "the impact of the concentration on market entry and technological progress . . . has the potential for [MOFCOM] to find that superior technologies operate as barriers to entry, and perhaps to require licensing of, or access to, this technology as a condition in clearing mergers," and that "two merging Chinese companies may be able to argue that the concentration promotes technological progress within China, or protects jobs, or promotes exports, or is otherwise consistent with the objectives spelt out in art. 1 of the Law. Two foreign companies without substantial facilities in China, but with substantial imports into the country, may meet the jurisdictional thresholds, but are unlikely to be able to build a case relating to the advantages of the merger to the 'public interest' in the same way." *Id.*, 105 and 106 n.29 (also citing Wang Xiaoye, *Highlights of China's New*

In addition, the current state of merger review in China leaves unclear precisely what kinds of procompetitive efficiencies and synergies can or will be considered by MOFCOM and to what extent. In particular, Article 27's requirements that MOFCOM consider the effects of the concentration on (*inter alia*) market entry, the progress of technology, "other undertakings" (not only consumers), and "national economic development" appear to suggest that Chinese practice in relation to efficiencies likely will be closer to that of Canada (which permits consideration of efficiencies that are redistributed from consumers to producers, such as scale economies[153]) than to that of the United States or Europe (which consider only efficiencies that add to consumer surplus[154]). This suggestion is supported by more general references in, for example, Article 1 of the AML, which includes among the principal purposes of the AML not only prohibiting monopolistic conduct and safeguarding fair market competition but also "improving efficiency of economic operation," protecting public (as well as consumer) interests, and "promoting the healthy development of the socialist market economy" (i.e., the domestic Chinese economy).[155] On the other hand, the requirement in Article 15 that most (but not all) exemptions for otherwise prohibited monopoly agreements

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Anti-Monopoly Law, 75 ANTITRUST L. J. 133,143 (2008) (noting that "a transaction that benefits some public interest may not benefit competition")).

153. *See* Commissioner of Competition v. Superior Propane Inc., 2000 Canada Comp. Trib. 16, (Apr. 4, 2002), available at http://recueil.cmf.gc.ca/eng/2003/2003fca53/2003fca53.html (last visited Mar. 21, 2011) ("In the Tribunal's view, there is no policy choice to favour consumers in the merger provisions of the [Canada Competition] Act.") (citing O. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 711 (1977) ("a general case that user interests greatly outweigh seller interests is not easy to make and possibly reflects a failure to appreciate that profits ramify through the system in ways—such as taxes, dividends, and retained earnings—that greatly attenuate the notion that monolithic producer interests exist and are favored")). *See also* MARK FURSE, *supra* note 18, 59 ("In Taiwan there is substantial willingness of the TFTC to approve mergers which might give rise to some competitive harm where the effect of the merger is to increase the efficiency of the enterprise, allowing it to contribute to economic development in Taiwan.").

154. *See, e.g.*, U.S. Horizontal Merger Review Guidelines (2010), § 10 ("the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market.... The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.... In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.") (footnotes omitted); EC Horizontal Merger Review Guidelines, 76–88; ICN Merger Guidelines Workbook, *supra* note 131, 62 ("most jurisdictions do not take account of increases in producer efficiencies. This is largely for policy reasons as countries have mostly decided that the core purpose of a merger control regime is to protect consumers (or customers) against a loss of consumer welfare.").

155. *See* AML, art. 1.

only may be granted if the parties to the agreements can prove that consumers at least will "share" some of the claimed procompetitive benefits[156] might appear to suggest that, in the merger review context, MOFCOM also should limit its consideration of efficiencies to those in which consumers will share the benefits. But even in Article 15 of the AML, the remaining exemption for monopoly agreements "protecting legitimate interests in foreign trade and economic cooperation" does not require that consumers share in the benefits.

VII. MOFCOM Decisions

Substantive decisions by MOFCOM include decisions (1) unconditionally approving a concentration;[157] (2) approving a concentration with restrictive conditions;[158] (3) prohibiting a concentration; (4) ordering the undertaking concerned to stop implementing the concentration, to dispose of its stock or assets within a specified time limit, to assign its business within a specified time limit, to adopt other necessary measures to restore the market situation before the concentration, and to impose a fine of less than RMB 500,000 in case of illegal concentration.[159] Procedural decisions by MOFCOM include decisions to enter into further review of a concentration.[160] In practice, MOFCOM also issues a written notice for formal acceptance of a notification (thus starting the review period).

A. Approvals

MOFCOM can approve a notified transaction at any time. It is required to notify the parties in writing but need not make a public announcement of any approval.[161]

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156. *Id.*, art. 15 ("Where the monopoly agreement falls under [exemptions] (1) to (5) . . . undertakings shall, in order to be exempted..., also prove that the agreement will not substantially restrict competition and will enable consumers to share the benefits derived from the agreement"). These grounds for exemption include, *inter alia*, "improving operational efficiency and enhancing the competitiveness of small and medium-sized enterprises" (item (3)). Chapter 2 of this book discusses prohibited monopoly agreements and the Article 15 exemption structure in more detail.
157. AML, arts. 25, 26, and 28.
158. AML, art. 28 and 29.
159. AML, art. 48.
160. AML, art. 25.
161. *Id.*, arts. 25–26.

Chapter 2. Voluntary Notification and Clearance Decisions: Merger Control

359. Please refer to paragraphs 85–92 and 292–332 above for review of main provisions and the application of the AML merger control regime.

360. Notifiable materials. Pursuant to the AML and the Notification Measures, the filing materials and documents to be submitted include the following: (1) a notification form, containing the names of the parties, registered business addresses, scope of business, as well as the date on which the concentration will take place; (2) explanations on the influence of the concentration on the competition situation in the relevant market; (3) the transaction agreement and other relevant documents; (4) the financial and accounting reports for the previous accounting year of the participating undertakings, audited by public accountants; and (5) other documents and materials as may be required by the authority.

361. A standard notification form is provided by the MOFCOM for the parties' reference. Many sections of the standard notification form are similar to the European Commission's Form CO, although the MOFCOM imposes more extensive additional information requirements on the parties. For example, the notifying party is required to provide opinions of relevant parties such as local governments, industry regulators, and the general public for an assessment of the concentration's potential social effect. Experience suggests that the MOFCOM requires filings to be relatively detailed before they will be accepted as complete.

§1. Preliminary Filing Obligations

I. Criteria and Thresholds

362. Filing is mandatory and suspensory. Under the AML, a concentration must not be implemented until clearance has been obtained from the MOFCOM. The MOFCOM has the power to block a concentration or impose remedies before clearing the concentration.

363. Mergers, acquisitions or other types of transactions that are characterized as concentrations of undertakings are caught by the AML merger filing obligations if they meet the notification thresholds set out in the Notification Thresholds Rules.[1] A mandatory notification obligation will be triggered if any of the following thresholds are met:[2]

(1) the total worldwide turnover of all undertakings participating in the concentration is more than CNY 10 billion in the preceding accounting year and the China-wide turnover of each of at least two undertakings participating in the concentrations is more than CNY 400 million in such year; or
(2) the total China-wide turnover of all undertakings participating in the concentration is more than CNY 2 billion in the preceding accounting year and the China-wide

turnover of each of at least two of the undertakings participating in the concentrations is more than CNY 400 million in such year.

1. AML, Art. 21; Notification Thresholds Rules, Art. 3.
2. Notification Thresholds Rules, Art. 3.

364. Voluntary notification. It should be borne in mind that the MOFCOM has the discretion to review a concentration that does not meet any of the notification thresholds, if, based on the facts and evidence gathered pursuant to the prescribed procedures, the MOFCOM considers that the concentration has or may have the effect of eliminating or restricting competition.[1] This means that the MOFCOM has the ability to review a non-notifiable concentration and impose remedies if it finds that there is the effect of eliminating or restricting competition. Under the MOFCOM's Draft Measures on Non-notifiable Concentrations, such discretionary review may be initiated in the event of complaints from customers and competitors.[2] In addition, the Notification Measures provide that, in cases where a concentration does not meet the notification thresholds, the undertakings participating in the concentration may nevertheless voluntarily notify such a concentration.[3] This means that, in practice, parties may choose to file on a voluntary basis in circumstances where the transaction may raise competition concerns.

1. Notification Thresholds Rules, Art. 4.
2. Draft Measures on Non-notifiable Concentrations, Art. 3.
3. Notification Measures, Art. 16.

365. Exceptions to notification. The AML provides that a notifiable concentration should not be implemented without a prior notification. The following are the two exceptions to the notification obligation: (1) an undertaking concerned already holds more than half of the voting rights or assets of all other undertakings involved in the concentration; or (2) an undertaking not involved in the concentration holds more than half of the voting rights or assets of all other undertakings involved in the concentration.[1]

1. AML, Art. 23.

II. Turnover Calculation

366. The Notification Measures set out rules for the calculation of turnover, which generally follow prevailing international practices. The following principles apply when determining whether a notification obligation is triggered.

(1) *Measuring turnover.* Turnover should reflect the sales of products and the provision of services for the whole of the preceding accounting year after deducting the relevant taxes and surcharges.[1]

(2) *Allocation of turnover.* Turnover within China means turnover derived from transactions in which the purchaser of products or services provided by the undertaking is located in China. That means that turnover should be allocated according

1. Draft Notification Measures (March 2009 version), Art. 3(2).
2. Nicholas French & Michael Han, 'China', in *Getting the Deal Through: Merger Control 2011*, ed. Global Competition Review (London: Law Business Research, 2010), 93.

372. Joint ventures. The AML does not specifically address the circumstances in which joint ventures should be analysed as concentrations as opposed to potential monopoly agreements. An early draft of the Notification Measures provided that 'the establishment of a new continuously and independently operating enterprise by two or more undertakings fall into the scope of concentrations of undertakings as provided in Article 20 of the AML'.[1] This provision was deleted from the final Notification Measures, which no longer address the treatment of joint ventures.

1. Draft Notification Measures (March 2009 version), Art. 3, para.2.

373. The notifying party and filing fee. Pursuant to the Notification Measures, the notification of a concentration effected by way of merger shall be made by all undertakings involved in the merger. For a concentration effected by other means, the undertaking acquiring control or exert decisive influence shall make the notification, with the assistance of the other undertakings to the concentration.[1] In practice, a target company may be involved as a joint filing party. Filing fees have not been introduced at the time of writing.

1. Notification Measures, Art. 9.

§2. Structure of Proceedings

I. Preliminary Assessment and Full Investigation

374. The AML contemplates a two-phase review process. The Notification Measures and the Review Measures detail a number of key procedural issues regarding the hearing and issuance of statement of objections.

375. Investigations. The MOFCOM may investigate a notified concentration by requesting information and documents from the parties, customers, suppliers, competitors, and other relevant entities or government agencies.[1] The MOFCOM's recent practice indicates that the MOFCOM has actively solicited the views of trade associations, market participants, and government authorities and conducted on-site investigations when it deems necessary.[2]

1. Notification Measures, Art. 13; Review Measures, Arts 4–5.
2. See a discussion on the Coca-Cola & Huiyuan Decision at paras 304–310 above.

376. Hearing. The Review Measures provide that the MOFCOM may convene a hearing upon its own initiative or at the request of the relevant parties. The MOFCOM may invite a broad range of interested parties and experts, including the undertakings participating in the concentration, competitors, upstream and

downstream enterprises, trade associations, government departments, and consumers to participate at the hearing by delivering written or oral statements.[1]

1. Review Measures, Art. 7.

II. Time Framework

377. Deadlines for filing. The AML does not provide for any deadlines for filing; however notifiable concentrations cannot be closed without being notified to and cleared by the MOFCOM.[1]

1. AML, Art. 21; Notification Threshold Rules, Art. 3.

378. Initial review and further review. The initial review period (Phase I) is thirty days, commencing on the date that the MOFCOM accepts the filing as complete. At the end of the initial review period, the MOFCOM must issue either a written decision to clear the transaction or a written notice of further review.[1] Upon the expiration of the initial review period, if the filing party does not receive any written notice of further review, the transaction is deemed to have been cleared and the parties are free to implement the concentration.[2] If the filing party receives a written notice of further review, a further review period of ninety days (Phase II) commences.[3] Under certain circumstances, the further review period may be extended by a maximum of sixty days. The extension may be granted where: (1) the parties agree; (2) the documents or materials submitted are inaccurate or need further verification; or (3) the relevant circumstances have significantly changed following the notification.[4] The AML and the Review Measures are silent on whether the time framework can be suspended by the MOFCOM.

1. AML, Art. 25, para. 1.
2. *Ibid.*, Art. 25, para. 2.
3. *Ibid.*, Art. 26, para. 1.
4. *Ibid.*, Art. 26, para. 2.

379. Previously, it was unclear to the parties involved and their counsel as to when a review phase began and ended. The Notification Measures and the Review Measures filled in the gap by requiring that the MOFCOM notify the parties in writing when the notification is deemed complete and when the initial and further review periods begin.[1]

1. Notification Measures, Art. 14; Review Measures, Art. 9.

380. Expedited review. No formal expedited review process is available at present. However, the MOFCOM has shown that it is willing to be flexible in certain procedural issues. For example, it is reported that, in the Fiat/Chrysler transaction, the parties cited financial exigencies as the reason for expedited review and the MOFCOM considered the request and cleared the transaction in a significantly reduced time frame. Normally, at least a month would have been spent on pre-notification consultations with a further month required for the Phase I review. However, in the *Fiat/Chrysler* notification, the

1. AML, Art. 41.
2. Notification Measures, Art. 12, para. 3.
3. Review Measures, Art. 16.

§3. Clearance and Conditional Clearance

385. Sanctions for closing before clearance. The AML provides for various legal sanctions for non-compliance with AML merger control. Undertakings that fail to notify a notifiable transaction to the MOFCOM may be subject to various penalties. The MOFCOM may order that the undertakings cease the implementation of the concentration, dispose of shares or assets, transfer certain businesses within a given time limit or adopt any other necessary measures to restore the market to its state before the implementation of the concentration. The MOFCOM may also impose a fine of a maximum of CNY 500,000.[1] No sanctions have been applied so far.

1. AML, Art. 48.

386. Substantive test. Please see discussions at paragraphs 102–104 above.

387. Ancillary restrictions. The AML does not provide any provisions concerning ancillary restrictions. It remains to be seen how ancillary restrictions will be assessed and treated under the AML merger control regime.

I. Conditions and Undertakings

A. Content

388. Types of merger remedies. If the MOFCOM has concerns over the competitive effects of a proposed concentration, the MOFCOM may attach remedies to its clearance of such a concentration. According to the Review Measures, the MOFCOM may impose structural remedies, behavioural remedies or a combination of both, and examples of both types of remedies exist in practice.[1]

1. Review Measures, Art. 11.

389. Requirements for merger remedies. Pursuant to the AML, the MOFCOM may conditionally approve a concentration in order to reduce its negative effect on competition.[1] According to the Review Measures, remedies proposed by undertakings should be able to remove or reduce the anticompetitive effects of the concentration and shall be practically enforceable. Written versions of the remedies should be clear and precise to allow their effectiveness and practicability to be properly evaluated.[2]

1. AML, Art. 29.
2. Review Measures, Art. 12.

12 Merger Remedies in China: Substance and Procedure

PENG Yao & SUN Zhaoqiu

§12.01 INTRODUCTION

Since the Anti-Monopoly Law (AML)[1] took effect in August 2008, the Ministry of Commerce (MOFCOM), the authority responsible for merger control under the AML, imposed remedies in 16 transactions out of the 528 cases it concluded by the end of 2012. Under the AML and its implementing rules, there are only a few broad provisions governing remedies, and MOFCOM has not yet issued any guideline or specific rule on either substantial or procedural aspects of merger remedies.

Judging from the conditional clearances announced so far, MOFCOM's general approach on merger remedies is basically in line with other jurisdictions like the European Union (EU) and the United States (US). Remedies are generally adopted in forms of structural remedies and behavioral remedies. Both types of remedies have been imposed by MOFCOM in horizontal and vertical mergers. At the same time, as a young competition agency, MOFCOM attempts to establish its own practice which appears distinct from the practice of other jurisdictions in several ways. Compared to other competition authorities, MOFCOM shows more flexibility and seems more willing to accept behavioral remedies or other types of commitments. At the same time, remedies are sometimes required to address various issues beyond pure competition concerns.

Given that there is no practical guidance and in the light of the developing practices in the Chinese remedies regime, it can pose a challenge for merging parties to propose a remedies solution to MOFCOM. This article intends to provide a brief introduction on the legislation and past cases regarding merger remedies in China, and

[1] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.

attempts to study the relatively undocumented practices with a view to offering information and reference to businesses, lawyers and academics.

§12.02 LEGISLATION AND PRACTICE OF THE REMEDIAL SYSTEM

[A] Legislation Overview

When MOFCOM finds that a notified concentration will cause competitive harm, to impose "remedial measures" to mitigate that harm and thereby allow the concentration to go ahead. MOFCOM considers the possible effects of the concentration against the objectives of the AML, and attempts to preemptively mitigate any possible harm caused. As a result, any adverse impact of a merger should be eliminated, or at least substantially reduced. The remedial system is therefore an extension of the substantive merger review system. The objective of the remedial system is to correct any negative results arising from a transaction, while at the same allowing any efficiencies.

In China, the remedial system for merger control was officially established in the AML under Articles 28, 29 and 30. However, the AML only sets forth some principles for the remedial system, but does not clearly stipulate the substantive or procedural issues for its implementation.

On November 24, 2009, MOFCOM promulgated the Measures on the Review of Concentrations between Business Operators (Review Measures).[2] These measures stipulate the purpose, types, requirements, modification as well as supervision and implementation of the "restrictive conditions," as remedies are called in China. The Review Measures provide guidance *inter alia* on how to comply with, and navigate the merger review system in China. However, the Review Measures are relatively brief and a lot of detail is missing—such as the process and time limits for proposing remedial measures.

Remedies can be split into two kinds:

- Structural remedies generally involve the sale of physical assets by the merging firms or require the merged firm to create new competitors through the sale or licensing of intellectual property rights.
- Behavioral remedies usually prescribe certain aspects of the merged firm's business conduct post-closing.

Structural remedies seek to change the substantive nature of the concentration to mitigate MOFCOM's concerns. They include various kinds of asset and business divestment, typically characterized as one-off measures that intend to restore or maintain the competitive landscape as before the concentration. Behavioral remedies do not change the nature or structure of the concentrated entity, but impose limiting conditions on the entity's behavior post-transaction.

2. Measures on the Review of Concentrations between Business Operators, [2009] MOFCOM Order No. 12, Nov. 24, 2009.

For the implementation of structural remedies, MOFCOM formulated the Provisional Regulation on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators (Divestiture Regulation) based on the Remedial Measures, which became effective in July 2010.[3] The Divestiture Regulation deals with the concept of assets or businesses divestiture, types of divestiture, requirements for monitoring trustees and divestiture trustees as well as their duties and conditions, qualifications for the buyer of the assets or businesses to be divested, supervision and evaluation duties of the authority.

In summary, there are currently only three pieces of legislation related to remedial measures in China. In addition, the Divestiture Regulation only prescribes the implementation of structural measures and, even there, does not touch upon the negotiation and evaluation of such measures. In practice, however, it is possible to see some patterns in the way that remedies are negotiated and determined (*see* below).

[B] Overview of Cases So Far

From the implementation of the AML on August 1, 2008 to December 2012, MOFCOM's Anti-Monopoly Bureau cleared 16 notifications subject to remedies.[4] These remedies involve structural or behavioral remedies, or a hybrid of the two. Among the 16 notifications cleared with remedial measures, there are only six from 2008 to 2010, while the remaining 10 occurred in 2011 and 2012. In 2012, MOFCOM closed 154 merger cases and imposed conditions on six of them—the highest percentage of conditional clearances yearly since the AML came into effect.[5]

This trend indicates that clearances with remedies are increasing. In addition, the specific remedial measures taken by the authority have become increasingly diverse. The application of the major two remedies in practice will be discussed below.

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[3] Provisional Regulation on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators, [2010] MOFCOM Order No. 41, Jul. 5, 2010.

[4] According to official statistics from MOFCOM, there are 474 notifications in total concluded by MOFCOM between Aug. 1, 2008 and Sep. 30, 2012, among which, one was prohibited, 16 were cleared with remedies attached and all the others are cleared without remedies. On December 6, 2012, MOFCOM issued another conditional clearance regarding a proposed joint venture to be established by ARM, Giesecke & Devrient, and Gemalto. The total conditional clearance decisions are up to 16 as of Chinese New Year 2013. For detailed information, please visit: http://www.gov.cn/jrzg/2012-01/10/content_2041384.htm.

[5] *See* MOFCOM's press release dated on Dec. 30, 2012, http://www.gov.cn/gzdt/2012-12/30/content_2302199.htm.

Table 12.1 Remedies in Past Cases

Cases	*Structure Remedies (Divestiture)*	*Behavioral Remedies/Other Types of Remedies*	*Both Behavioral and Structural*
Inbev/Anheuser-Busch		√	
Mitsubishi Rayon/Lucite International	√		
General Motors/Delphi		√	
Pfizer/Wyeth	√	√	
Panasonic/Sanyo	√	√	
Novartis/Alcon		√	
Uralkali/Silvinit		√	
Alpha V/Savio	√		
General Electric/Shenhua		√	
Seagate/Samsung		√	
Henkel/Tiande Chemical		√	
Western Digital/Hitachi	√	√	
Google/Motorola Mobility		√	
United Technologies/Goodrich	√		
Wal-Mart/Newheight		√	
ARM/Giesecke&Devrient/Gemalto		√	
Total	**6**	**13**	

As shown in the table above, by Chinese New Year 2013, MOFCOM had ... structural remedies in six cases, among which three also saw the impositi... behavioral remedies at the same time. Out of the 16 cases that had been conclu... then, 13 of them received behavioral remedies. In summary, looking at the ... practices in China, behavioral remedial measures are adopted more often ... structural ones and are widely applied in all types of mergers—including ... horizontal and vertical mergers.

The primary reason behind the wide acceptance of behavioral remedies pro... lies in the fact that they allow the parties to complete their deal without ... significant structural changes. Although the nature of behavioral remedies requi... merging parties to pursue certain activities post-merger, their advantage is that ... not require any divestment of assets. Behavioral remedies may also be attracti... young authority like MOFCOM, since it may require more sophisticated skills to ... appropriate structural remedies.

MOFCOM applies two types of behavioral remedy: *positive* remedies that ... the parties to act, and *negative* remedies that prevent the parties from act...

particular ways. Positive behavioral remedies include allowing access to infrastructure, supply of key inputs, intellectual property licenses, technology assistance, etc. Negative behavioral remedies include prohibition of exclusive contracts, prohibition of unreasonable discrimination, prohibition of increasing shares or controlling shareholdings, etc.

It is worth noting that MOFCOM appears recently to become concerned about the implementation of behavioral remedies. In order to oversee the compliance of a behavioral remedy, the authority has to devote substantial resources on a lasting basis to monitor that the remedy is fully implemented. At the same time, the authority has also noticed companies' complaints about the monitoring process which in some cases turns out to be very costly and burdensome. During the remedies negotiations in the last few months, from our experience it can be seen that MOFCOM is considering structural remedies more actively than it has done in the past. As such, difficulties in monitoring compliance with behavioral remedies might change MOFCOM's approach in the near future.

§12.03 GENERAL PROCEDURE OF NEGOTIATION ON REMEDIES

Remedial measures are negotiated in a process involving the merging parties and MOFCOM.

In general, MOFCOM identifies specific competition concerns, and the merging parties may propose to modify or re-design their merger project in order to mitigate these concerns and avoid prohibition.

At present, no concrete guidelines or implementation rules on the general procedure of remedy negotiations have been released. Therefore, it is difficult for the merging parties to properly set expectations as to the process, time schedule or the rights and obligations in the negotiation process. Nonetheless, there exists a large flexible space for negotiation between the merging parties and MOFCOM, as described below. Where the merging parties take the initiative and devise an active remedy strategy, supported by good communication and cooperation with MOFCOM, they usually achieve sufficient time and space for effective negotiation.

[A] Submission of Proposal on Remedial Measures

Article 11 of the Review Measures states that, in order to eliminate the ability or possible ability of the merger to restrict competition, the parties may propose remedial measures.

As a matter of fact, the concerns the authority identifies during the merger review sometimes may go beyond pure competition issues. This is due to the requirement on the authority, according to Article 27 of the AML, to evaluate various elements during the merger review process. Among these elements is the broad concept of the impact that the merger may have on the development of the Chinese national economy. It may also be due to the fact that other governmental agencies, which MOFCOM needs to consult with, normally come up with non-competition concerns, such as issues related

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1. BOOK CHAPTERS

    1. China's AML: The First Five Years (pgs. 179-87; 193-94)

    2. AML and Practice in China (pgs. 154-55;163)

2. EXCERPTS FROM FTC V. STAPLES CASE

§11.05 SUBSTANTIVE ANALYSIS

[A] Definition of the Relevant Product Market

The AML makes clear that a focus of the authority's assessment is the definition of the relevant markets.[58] The importance of properly defining the relevant market was also expressly recognized in the Guidelines on the Definition of the Relevant Market,[59] and implicitly recalled in the Provisional Regulation on the Assessment of the Impact on Competition of Concentrations between Business Operators.[60]

Article 12 of the AML defines the notion of "relevant market" as "the product scope and the geographical scope where business operators compete against each other for a specific product or service [] within a certain period of time." The Guidelines on the Definition of the Relevant Market further clarify that relevant markets are defined primarily on the basis of the substitutability of products,[61] in particular demand substitutability.[62]

Three observations can be made on the way MOFCOM defines relevant markets in practice.

First, the authority's reasoning when defining relevant markets is systematically short. In the *Inbev/Anheuser-Busch* decision,[63] the definition of the relevant market was not isolated as a separate item meriting discussion, although "the Chinese beer market" was mentioned in passing in the decision. It is only from 2009 that MOFCOM began expressly addressing the question of relevant market definition as a separate item in its published decisions—albeit often with limited details on the underlying analysis supporting its decisions.

In comparison, decisions published by the European Commission often dedicate several pages to an analysis of the relevant product and geographic markets, regularly commenting on the views of the merging parties and views that arose out of its market investigations. Similarly, the Australian Competition and Consumer Commission (ACCC) sets out its reasons for defining the market in its "public competition assessments," although these are generally not as detailed as the European Commission's decisions. Furthermore, the European Commission and ACCC decisions will often drill down and test the market definition, considering further product market categories within a broader market to identify possible market segmentation and to specifically define the parameters of each relevant market affected by the transaction. For instance, in the *Novartis/Alcon* case, the European Commission considered further segments of the ophthalmic pharmaceutical product and consumer vision product

58. AML, Art. 27.
59. *See*, e.g., Guidelines on the Definition of the Relevant Market, [2009] Anti-Monopoly Commission under the State Council, May 24, 2009, Art. 2.
60. Provisional Regulation on the Assessment of the Impact on Competition of Concentrations between Business Operators, [2011] MOFCOM Order No. 55, Aug. 29, 2011, Arts 3 and 5.
61. Guidelines on the Definition of the Relevant Market, [2009], Anti-Monopoly Commission under the State Council, May 24, 2009, Art. 3.
62. *Id.*, Art. 8.
63. *Inbev/Anheuser-Busch*, [2008] MOFCOM Public Announcement No. 95, Nov. 18, 2008.

markets, such as the markets for "over-the-counter" pharmaceuticals and prescription pharmaceuticals.[64] Similarly, the ACCC considered there to be a separate market for injectable miotics, as other miotic products, such as topical miotics, were unlikely to be considered suitable substitutes.[65] MOFCOM's decision did not consider these aspects when commenting on market definition in the same case.

It must be noted that in its more recently published decisions, such as *Seagate/ Samsung*[66] in 2011, and *Google/Motorola Mobility*,[67] *United Technologies/Goodrich*[68] and *Wal-Mart/Newheight*[69] in 2012, MOFCOM has started to provide greater insight into the reasoning underlying its definition of the relevant product and geographic markets by treating it as an issue that merits comment. Nevertheless, MOFCOM's approach is still limited to identifying the various "factors" forming the basis of its conclusion as to the market definition, and the authority still eschews any detailed discussion of the arguments put before it during its investigation.[70] This lack of explanation is arguably not only unhelpful for the parties, but also for any other companies relying on the authority's practice and reasoning for assessing the compatibility of their concentrations with the AML.

Second, MOFCOM has a tendency to define the market by identifying "factors," without analyzing the substitutability between products. For instance, in *Seagate/ Samsung*, MOFCOM identified only the general features of hard disk drives that are different from other storage media technologies, thereby implicitly justifying its decision to treat the hard disk drive market as an independent product market. There was no detailed analysis of substitutability amongst different forms of storage media, whether from the point of view of supply-side factors (technological and manufacturing differences) or demand-side factors (end use). Interestingly, although MOFCOM referred to potentially narrower subdivisions of the hard disk drive market based on differing hard disk drive end uses, MOFCOM expressed no view as to whether these divisions justify a narrower definition of the relevant product markets.[71] This is in contrast to the European Commission's decision in the same case,[72] which spans 24 pages and includes a detailed analysis of the relevant market. That decision looks in

64. Case No COMP/M.5778—*Novartis/Alcon*.
65. *See* the ACCC's published Public Competition Assessment (Aug. 31, 2010), *Novartis AG's proposed acquisition of Alcon Laboratories Inc*, http://www.accc.gov.au/content/index.phtml/itemId/940159/fromItemId/751043 (accessed Feb. 25, 2013).
66. *Seagate/Samsung*, sec. II.A.
67. *Google/Motorola Mobility*, sec. II.2.
68. *United Technologies/Goodrich*, [2012] MOFCOM Public Announcement No. 35, Jun. 15, 2012, sec. II.1.
69. *Wal-Mart/Newheight*, sec. II.
70. This contrasts starkly with the approach adopted by the European Commission regarding the same concentrations, where it systematically considers and evaluates the proposed market definitions and provides the basis of why it ultimately decides to accept, reject, or leave open certain market definitions.
71. A similar approach was taken in other cases, including the *Alpha V/Savio* and *Google/Motorola Mobility* and *Wal-Mart/Newheight* decisions. In the *Wal-Mart/Newheight* decision (sec. II), MOFCOM seems to have relied mainly on "the parties' business scope and models," but there is no explanation of why Chinese consumers do not consider online and brick and mortar supermarkets to be substitutable.
72. Case No COMP/M.6214 - *Seagate/ Samsung*.

depth at the demand and supply-side substitutability, taking into account the parties' views, feedback from market participants as a result of its investigations, as well as the reasons for the European Commission's conclusions. While it would be hazardous to conclude that MOFCOM has not conducted any substitutability analysis, the factor-based analysis conducted by it in *Seagate/Samsung* did lead to a substantially different conclusion than in the EU, and all interested would have surely benefited from a more thorough analysis to assess the authority's reasoning and practice in this case.

[B] Definition of the Relevant Geographic Market

As is the case when defining the relevant product market, the geographic market definition provided by MOFCOM is often a statement of the authority's conclusion, unlike the decisions of the European Commission[73] which always justifies its assessment of the geographic market (although the market definition is sometimes "left open").[74] This remains the case even in the recent decision of *United Technologies/Goodrich*, where MOFCOM again gives limited reasons for its analysis, although it does refer to "demand features" and "supply features." Consistent with its previous decisions, MOFCOM did not provide any insight into its reasons for determining each separate market, neither providing a demand or supply-side substitutability analysis nor considering views put forward by the parties to the concentration or market participants. In *Wal-Mart/Newheight*,[75] MOFCOM referred to "consumption habits, transportation and customs," which are indeed key factors that the authority generally relies on in defining the relevant geographic market.[76]

Finally, in practice, MOFCOM often analyses the Chinese segment of the relevant market, irrespective of whether this market is regional (Asia) or global in scope. As a result, the substitutability analysis becomes theoretical in practice as the authority has a tendency, in any event, to analyze the potential impact of the concentration on various geographic markets. It cannot be excluded that this approach has led MOFCOM to different conclusions than in other jurisdictions, including in *Seagate/Samsung* and *Western Digital/Hitachi*. In these cases, the hard disk drive markets were surely global in scope, but MOFCOM adopted conclusions quite at odds with the position adopted in all other jurisdictions where the transaction was filed.

73. *See*, e.g., Case No COMP/M.6381 - *Google/Motorola Mobility*.
74. To note that in *General Electric/Shenhua* (*see* sec. II), MOFCOM provided a limited although specific analysis: "The business operations of the proposed joint venture will be limited to China, and when choosing suppliers of coal-water slurry gasification technology, parties in China limit their choice to domestic suppliers, and the relevant geographic market for this concentration is therefore the Chinese market."
75. *Wal-Mart/Newheight*, sec. II.
76. *See also* Guidelines on the Definition of the Relevant Market, [2009] Anti-Monopoly Commission under the State Council, May 24, 2009, Arts 9(1), 9(2) and 9(4).

[C] Competition Analysis

The competitive analysis undertaken by the authority of course focuses on the standard question of whether the concentration raises competition concerns as a result of any horizontal, vertical or conglomerate effects.[77]

The AML specifically states that its aims are to "protect *fair market competition*, promote *efficiency* of economic operations, safeguard consumer welfare and the *public interest*, and promote the *healthy development of the socialist market economy.*"[78] This task arguably gives MOFCOM a broad discretion when it comes to assessing whether a given concentration is compatible with the AML. This is confirmed by Article 27 of the AML, which adds that the authority must assess "the impact of the concentration between business operators on the *development of the national economy.*"[79] The concept of "development of the national economy" is not defined, and enables the authority to depart from the usual legal or economic antitrust arguments and theories when deciding whether to approve a concentration.

[1] Horizontal Effects

When analyzing the horizontal effects of concentrations in its decisions, MOFCOM often focuses on two key market features (the parties' market shares and the existence of barriers to entry), and addresses the parties' defense.

[a] Parties' Market Shares

MOFCOM first assesses—quite traditionally when compared to the practice of other antitrust authorities—whether any overlap between the parties to the concentration may lead to any restriction on competition, either because the concentration is likely to "generate or strengthen the ability or incentive on the part of a single operator to unilaterally eliminate or restrict competition" (unilateral effects) or "to generate or strengthen the ability or incentive on the part of the relevant operators to jointly eliminate or restrict competition" (coordinated effects).[80] This analysis was conducted in several cases, but the conclusions drawn from this analysis are not always persuasive as very little weight is given to the other market features that would prevent the combined parties, even with a substantial market share, to restrict competition after implementing their concentrations.

The first factor that MOFCOM focuses on when assessing the compatibility of a concentration with the AML is the combined market shares of the parties to the concentration. It is however clear that the authority focuses not only on the degree of

77. *See* Provisional Regulation on the Assessment of the Impact on Competition of Concentrations between Business Operators, [2011] MOFCOM Order No. 55, Aug. 29, 2011, Art. 4.
78. AML, Art. 1 (emphasis added).
79. *Id.*, Art. 27 (emphasis added).
80. *See* Provisional Regulation on the Assessment of the Impact on Competition of Concentrations between Business Operators, [2011] MOFCOM Order No. 55, Aug. 29, 2011, Art. 4.

overlap between the parties' business, but also on the number of players remaining active in the market after the completion of the concentration. However, this test—which can be compared with the risk of "coordinated effect"—often stops short of any analysis of the actual or potential risk of coordination amongst the players active in the market after completion of the concentration. The following facts seem to suffice *as such* to create doubt in the authority's mind about the compatibility of a concentration with the AML:

- the difference in market shares between the new entity and the next biggest player (*Mitsubishi Rayon/Lucite International* and *Pfizer/Wyeth*);
- an insignificant increment in market share to an existing large market share (*Novartis/Alcon*); or
- the number of players reduced to three or two (*Panasonic/Sanyo*, *Alpha V/Savio*, *Seagate/Samsung* and *Western Digital/Hitachi*).

An analysis of some of the authority's decisions confirms the relatively rapid conclusions that the authority can reach without any apparent analysis.

In *Mitsubishi Rayon/Lucite International*, the authority focused on the combined entity's market share (64%), which was "much higher" than the second and third-ranking competitors. Although such a combined market share could indeed constitute prima facie evidence of the risk of unilateral effects, MOFCOM did not specify whether the market shares were stable, quantify the market shares of the remaining competitors, or specify the respective market shares of the two parties to the concentration (thus making it impossible to understand the incremental impact of the concentration). There was no detailed analysis of the means by which the combined entity could have exploited its dominant position on the Chinese market for MMA, a chemical substance. MOFCOM simply concluded that "the post-merger entity would be able to restrict and eliminate its competitors in the Chinese MMA market."

In *Pfizer/Wyeth*, MOFCOM was concerned with the creation of a unilateral effect in the market for the supply of swine pneumonia vaccines. There, the combination of Pfizer's 38% market share and Wyeth's 11.4% market share would leave the post-merger entity the leading player in the market (49.4%), the second-ranking competitor accounting for only 18.35% of sales in the previous financial year, and all other participants having a market share below 10%. MOFCOM refers to the post-concentration figure in the Herfindahl—Hirschman Index (HHI) of 2,182 to indicate the level of concentration in the market, an increase of some 336 points on the pre-merger level in an already concentrated market. Again, however, there was no detailed discussion of the precise ways in which the combined entity could exploit its position of market strength to eliminate or restrict competition in the relevant market. The decision only concludes that "the post-merger entity will be able to use economies of scale to expand its market [share] and thereby control prices."

In *Panasonic/Sanyo*, MOFCOM identified concerns arising from horizontal concentration in three separate markets. The analysis for some of the relevant markets was more detailed than for others, and provided a better understanding of the authority's reasoning. In the rechargeable lithium coin batteries market, where the combined

market share of the parties, the two leading players on the market, would be 61.6%, MOFCOM concluded that "because the majority of downstream users [of these products] have a policy of sourcing their products from two or more suppliers, the restriction of competition caused by the merger will be even more pronounced."

MOFCOM also concluded without much explanation that, post-merger, there will be no effective restraint on any decision by Panasonic to increase prices. Similarly, in the market for the supply of nickel-metal hydride batteries for vehicles, MOFCOM proposed an explanation which was easier to understand, i.e., that the concentration would very likely enable Panasonic to use its influence over PEVE (a joint venture company) to further weaken the level of competition in the market, because the post-merger entity, holding a 23% market share, would be one of only two competitors, with the other competitor in the market a joint venture established by one of the parties to the concentration, Panasonic.

The explanation of the third market (the civil nickel-metal hydride batteries market) was however very scant. The authority limited its reasoning to the fact that the market share of the post-merger entity would reach 46.3% and would be "far higher than any of its competitors." Such reasoning should not in itself be sufficient to reach any conclusion about the risk for competition. In comparison, the European Commission in its own *Panasonic/Sanyo* decision defined separate battery markets based on chemistries (and sub-chemistries) in the battery anode, and then proceeded to determine the competitive effects arising from the horizontal concentrations in those markets. The European Commission also concluded that the transaction would raise competition concerns in relation to rechargeable lithium coin batteries (due to a high combined market share of 60%–70% globally and 70%–80% in Europe) and NiMH batteries (as the transaction would significantly increase market share, making it significantly larger than its competitors).[81] Nonetheless, it dismissed any serious competition concerns about the market for the supply of NiMH modules or systems for automotive applications on the basis that competition to supply this technology had ended.

In *Novartis/Alcon*, MOFCOM identified two markets in which the business of both parties overlapped, but the explanation provided by MOFCOM of why it imposed restrictive conditions was not clearly expressed. In respect of the first market (for the supply of ophthalmologic anti-inflammatory/anti-infective combinations), MOFCOM found that the parties had a combined market share of more than 55% globally and over 60% in China, which would justify the imposition of a remedy. Nevertheless, in this market, Novartis had a market share of only 1% in China, and it had in fact already resolved to exit the market in connection with the transaction.[82] Clearly, in many other jurisdictions, such a small increment of market shares would be insufficient to conclude that the transaction could restrict competition.

81. The European Commission had additional competition concerns in relation to LiMnO2 batteries (a type of primary cylindrical lithium battery).
82. It must be remembered that MOFCOM found that even if Novartis withdrew from the market, it would still have the capacity to later re-enter the market and ramp up its sales of products on the Chinese market, thus potentially eliminating or restricting competition on the Chinese market.

In *Alpha V/Savio*, MOFCOM found that Uster and Loepfe were the only two global manufacturers of electronic yarn clearers worldwide, and that both companies would be controlled by Alpha V following the concentration (Loepfe being a subsidiary of Savio and Alpha V being the largest shareholder in Uster, with 27.9%). This fact would have been sufficient if a clear explanation of why and how Alpha V could have influenced Uster had been given; interestingly, the same transaction was cleared without conditions in other jurisdictions, arguably because it was doubtful that Alpha, as a minority shareholder of Uster without any negative control rights, could have had any "decisive influence" over Uster.

In *Seagate/Samsung* and *Western Digital/Hitachi*, MOFCOM's biggest concern related to the risk of coordination, as the number of suppliers of hard disk drives was being reduced from five to three as a result of these two parallel transactions. MOFCOM noted that the level of concentration in the hard disk drive industry is "relatively high," and that there was a particularly high risk of coordination owing to the "high level of transparency" between competitors as to their respective technology, costs, production and sales. MOFCOM attributed this high degree of transparency to the relatively small number of both manufacturers and purchasers of hard disk drives, together with the fact that hard disk drive manufacturers use the same distributors, which can thereby be used as a conduit for the exchange of commercially sensitive information between competitors.

Although this analysis seems reasonable at first sight, the European Commission ultimately dismissed this argument when it considered the issue of coordination in its parallel decision in *Seagate/Samsung*. The European Commission, applying the appropriate test, assessed whether, as a result of the merger, coordination would be more likely, more effective and more sustainable.[83] Contrary to the conclusion reached by MOFCOM, the European Commission focused on a much more sophisticated market definition (identifying each type of hard disk drive as a possible relevant market) and concluded that the removal of Samsung would not result in a risk of coordination in particular because Samsung had an insignificant market presence in the market, was not innovative, and was unlikely to constrain a supplier's ability to coordinate. Interestingly, the ACCC considered that the transaction was unlikely to result in a substantial lessening of competition for basically the same reasons as the European Commission.[84]

In *Western Digital/Hitachi*, the European Commission did conclude that there was a risk of coordination but in only one segment.[85] Nonetheless, the European Commission allowed Toshiba (the only other competitor on the market) to purchase the assets sold by Western Digital as a remedy, implicitly consenting to a market with

83. Case No COMP/M.6214 - *Seagate/HDD Business of Samsung*.
84. *ACCC Mergers Register, Seagate Technology PLC - proposed acquisition of the hard disk drive business of Samsung Electronics Co Ltd.*, http://www.accc.gov.au/content/index.phtml/itemId/1022164/fromItemId/751043 (accessed Feb. 25, 2013)
85. At the time of the drafting of this article, only the European Commission's press release was available—at http://europa.eu/rapid/press-release_IP-11-1395_en.htm. (accessed Feb. 25, 2013).

only three competitors as an acceptable outcome in this high technology market.[86] MOFCOM did not share this view and imposed a very harsh hold-separate remedy on the parties, completely preventing them to merge with one another (in *Seagate/Samsung* the hold-separate remedy only applied to some aspects of the parties' business), hereby ensuring that at least four players would remain active in the market.

Interestingly, in *United Technologies/Goodrich*, MOFCOM identified competition concerns in the horizontal overlaps between the parties in the market for aircraft alternating current generation systems (AC generation system), as United Technologies (72%) and Goodrich (12%) were the two main suppliers in that market, and the post-concentration HHI would reach 7,158, an increase of 1,728 points on the pre-concentration position. MOFCOM noted that the merging parties had won the majority of bidding contracts in the past couple of years and considered that other competitors in the market did not exert a significant competitive constraint on them. Furthermore, United Technologies was found to own the leading technologies in aircraft AC generation systems, and MOFCOM held that the transaction would further enhance United Technologies' dominance in the market. MOFCOM's decision included similar issues to those mentioned in the European Commission's press release concerning the same transaction (MOFCOM's decision was released a month before the European Commission's media release). In the press release, the European Commission arrived at a similar result but found, in addition, that the transaction would also have "detrimental effects for engine producers through its effects on the market for engine controls for small engines and fuel nozzles for engines."[87]

[b] Barriers to Entry

The risk of unilateral or coordinated effects can be exacerbated by the presence of high barriers to entry, preventing potential competitors from contesting the market power gained as a result of the concentration. This factor is expressly provided for in Article 7 of the Provisional Regulation on the Assessment of the Impact on Competition of Concentrations between Business Operators. MOFCOM has referred to this risk to justify some of its decisions:

- barriers due to R&D and technology development;[88]
- technological and financial resources;[89]

86. Case No COMP/M. Case No COMP/M.6531 - *Toshiba/HDD assets of Western Digital.*
87. European Commission press release, *Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions*, Jul. 26, 2012, http://europa.eu/rapid/press-release_IP-12-858_en.htm (accessed Jan. 15, 2013).
88. In *Pfizer/Wyeth*, MOFCOM referred to the magnitude of investments to develop a new product in pharmaceutical markets (USD 2.5 and 10 million) as well as to "technical barriers to entry." In the *Alpha V/Savio* decision, MOFCOM commented that "patents, proprietary technology and commercial secrets play a key role in the development and manufacturing of automatic yarn clearers, and the technology for automatic yarn clearers is protected by patents and other intellectual property rights" (sec. IV.2.C). *See also* the *Seagate/Samsung* and *Western Digital/Hitachi* decisions.
89. *See*, e.g., *Google/Motorola Mobility*, sec. II.7; *United Technologies/Goodrich*, sec. II.2.

- regulatory restrictions;[90]
- the capital and time required to build facilities;[91]
- economies of scale;[92]
- slow market development;[93]
- few market entrants in recent years;
- geological scarcity of a product;[94]
- limited opportunities for new entrants given the very long life cycle of the existing products in the market;[95] and
- the existing high degree of concentration in the relevant market.[96]

It is therefore obvious that MOFCOM pays close attention to the existence of barriers to entry, which is in line with practice elsewhere.

[c] Parties' Defense

One key defense to counter-balance the risk of unilateral or coordinated effects is the ability of the customers, through their bargaining power, to oppose any attempt by the new merged entity to increase prices. This defense, which is common in almost all jurisdictions, was considered but rejected in *Panasonic/Sanyo* and in *Seagate/Samsung* (and *Western Digital/Hitachi*). This does not mean, however, that this defense is rejected as such in China, as it may be (and actually has been) used in other merger control cases with more success.

In *Panasonic/Sanyo*, MOFCOM rejected the arguments at least vis-à-vis downstream customers of small and medium-sized enterprises.[97]

In *Seagate/Samsung*, MOFCOM concluded that there was unlikely to be any effective resistance by buyers to price increases arising as a result of reduced competition in the hard disk drive market, because purchasers of hard disk drives are either too weak (as in the case of distributors) or lack the incentive (as in the case of manufacturers of computers) to effectively resist price increases. In the case of the large

90. *See*, e.g., *Henkel/Tiande Chemical*, sec. II.
91. *See*, e.g., *Uralkali/Silvinit*, sec. II; and *United Technologies/Goodrich*, sec. II.2.
92. *See*, e.g., *Alpha V/Savio*; *Seagate/Samsung*, sec. II.G (*see* as a comparison the analysis of the European Commission in *Seagate/Samsung*, paras 374–375); and *Western Digital/Hitachi*, sec. II.G.
93. In its *Panasonic/Sanyo* decision, the European Commission shared this view, stating that its investigation suggested a new competitor was not expected to enter the market "due to the high capital costs for new production facilities and the stable demand for NiMH batteries" (para. 74). Both MOFCOM and the European Commission sought remedies in relation to NiMH batteries to remedy their concerns.
94. *See*, e.g., *Uralkali/Silvinit*, sec. II.
95. *See*, e.g., *United Technologies/Goodrich*, sec. II.3. The European Commission also found that high barriers to entry were present in the market, although did not elaborate on the reasons why in its press release.
96. *See*, e.g., *Google/Motorola Mobility*, sec. II.7. Interestingly, barriers to entry in the same market were not an area considered by the European Commission in its published decision.
97. In comparison, the European Commission acknowledged that purchasers of nickel-metal hydride batteries for hybrid or pure electric vehicles exercised significant buyer power (*Panasonic/Sanyo*, para. 111).

"benefit" (in a competitive sense) from being under the same ultimate control as another brand of fruit juice, unless the market share of the combined entity is sufficient to confer market dominance (and there is no suggestion in MOFCOM's decision that the market shares attaching to the two fruit juice brands were anywhere near that point).

Second and more controversially, MOFCOM held that if Coca-Cola were permitted to acquire Huiyuan, the post-merger entity would be able to extend its dominant position in the carbonated soft drink market into the fruit juice market.

The reasoning in MOFCOM's decision in the *Coca-Cola/Huiyuan* case was thin, particularly in view of the unorthodox nature of the theories of harm relied on by the authority. MOFCOM's argument seems to be that Coca-Cola would be in a position to leverage its market position in the carbonated soft drink market to carry out tie-in sales in the fruit juice market. MOFCOM provides no reasons to justify its application in this case. In particular, the decision does not refer to any facts showing that Coca-Cola would have either the ability or the incentive to extend its dominant position in the carbonated soft drink market to the juice market. It is also unclear how the new Coca-Cola group could have used its new portfolio of beverage products to reinforce its market strength in the relevant markets. It is understood that MOFCOM relied on precedents in other jurisdictions to support its assessment (in particular Australia), but it is not clear whether these precedents had not been widely criticized in these jurisdictions if not overruled.

In the 2012 *Wal-Mart/Newheight* decision, MOFCOM concluded that Wal-Mart could leverage its "competitive advantages" in the physical retail market to the online retail market, where the target is the "largest" supplier.[118] However, it is unclear how the authority has concluded that Wal-Mart had a position which would have been sufficiently substantial to leverage its position: there is no explanation as to why online or brick-and-mortar supermarkets constitute separate relevant markets, nor any explanation on the risk of bundling or tying, nor any attempt to assess the risk of new entrants rendering unviable any attempt to bundle sales from one market to another.

§11.06 CONCLUSION

Despite MOFCOM's reluctance to admit that it has developed a practice, reality shows that the authority has developed strong habits or reflex when assessing concentrations under the AML.

MOFCOM's practice exists and has undeniably evolved since 2008. But this evolution is often relatively hidden or implicit as only few precedents are published (around 3% of the cases notified so far). Key issues, including the notion itself of "concentrations" or "control," remain unsettled, while it seems that the review process is getting longer and longer, and always more complex. While the traditional concepts of horizontal overlaps, vertical foreclosure or conglomerate effects are applied in its decisions, the authority and other Chinese agencies involved in the process take other

118. *Wal-Mart/Newheight*, sec. II.

considerations into account, including the "healthy development of the socialist market economy" to justify their position. The published decisions are relatively short on key issues, including the substantive assessment itself, parties have no access to the authority's files, and the objections raised by the authority are only transmitted orally. It is therefore fair to conclude that the current merger control regime in China is very specific and can only partially compare to the regime existing in other jurisdictions.

This article has attempted to summarize this practice, and give some guidance on the merger control process in what has now arguably become—after the US and the EU—the third global merger control hub.

that it had, *inter alia*, surveyed thirty-nine competitors and downstream users of the battery products in question.

MOFCOM now has a number of staff economists available to assist with merger review. Anecdotal reports indicate that, at least in some particularly complex proposed transactions, MOFCOM has retained outside economists to assist with its investigations.[121]

C. Third Parties

The AML does not specify any rights for third parties with respect to the merger review process. However, the MOFCOM Review Rules make clear that any interested third parties, including individual consumers, companies, industry associations, and government entities, may submit information or opinions to MOFCOM.[122] Such interested third parties also may request that MOFCOM conduct hearings, although MOFCOM has sole discretion to decide whether or not to do so.[123] In practice, MOFCOM appears regularly to solicit input from numerous third parties as well as to accept and consider any unsolicited information or complaints.[124] It appears that, at least in some cases, complaints and concerns raised by third parties-especially domestic ones- can substantially slow down the review process, even if those concerns do not relate to competition law issues.

VI. Substantive Standards

A. Overall Review Criteria

The substantive test in Chinese merger review is whether the proposed concentration "will result in or may result in the effect of eliminating or

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121. Under EU procedures, such third-party expertise is a potential option for the European Commission and its reviewing courts such as the European Court of First Instance. *See, e.g.*, C.F.I. Rules of Procedure, art. 70. However, the European Commission rarely relies on outside experts in merger cases. An outside expert also famously was used by the U.S. District Court in monopolization (abuse of dominance) litigation brought by the Department of Justice (DOJ) against Microsoft. *See* Brief of Professor Lawrence Lessig as Amicus Curiae, submitted at the request of the court in *United States v. Microsoft Corp.*, Civ. Action Nos. 98-1232 and 1233 (D.D.C) (Feb. 1, 2000), *available at* http://www.lessig.org/content/testimony/ab/ab.pdf (last visited Mar. 8, 2011). The use of independent outside experts may be more likely in the PRC merger review process, at the MOFCOM review stage and during any judicial review, given the long tradition in PRC court procedure of using (and indeed preferring) court-appointed experts on complex issues such as economic analysis.

122. *See* MOFCOM Review Rules, art. 6.

123. *Id.*, art. 7.

124. Interview with Shang Ming, *supra* note 32, at 5.

restricting market competition."[125] There has been no detailed guidance to date on the interpretation or application of the concept of "eliminating or restricting market competition."[126] The Chinese standard does not require that there be a "substantial" or "material" effect on competition. MOFCOM has not established any safe harbors for its review.

Article 28 of the AML states that, "[w]here a concentration of undertakings results in or may result in the effect of eliminating or restricting market competition, [MOFCOM] shall make a decision to prohibit the transaction."[127] However, as discussed below, it also allows that MOFCOM "may decide not to prohibit the concentration if the undertakings involved can prove either that the positive effect of the concentration on competition obviously outweighs the negative effect, or that the concentration is in the public interest."[128]

B. Relevant Markets and Market Definition

The Market Definition Guidelines issued by the AMC in May 2009 apply equally to merger review. As discussed in Chapter 3 of this book, they focus the definition of relevant market on product substitutability, particularly demand substitution.[129] The Guidelines reference the "smallest market

125. *See* AML, art. 28.

126. Under EU law, the substantive test under Art. 2 of the EC Merger Regulation is whether a concentration "would significantly impede effective competition in the common market or a substantial part of it, in particular as the result of the creation or strengthening of a dominant position." This test was introduced in order to ensure that noncoordinated effects in oligopolistic markets would be caught, which was uncertain under the superseded earlier regulation, Regulation No 4064/89 of Dec. 21, 1989 on the control of concentration between undertakings, *available at* http://ec.europa.eu/competition/mergers/legislation/en.pdf (last visited Mar. 8, 2011). *See* EC Merger Regulation, *supra* note 14.

127. *See* AML, art. 28. However, the AML does not, as South Korea does, provide for a presumption of anticompetitive effects based on the combined firms' market share, even though Article 19 of the AML provides a similar presumption with regard to dominant market position. *See* South Korea Monopoly Regulation Act, art. 4, *available in English at* http://eng.ftc.go.kr/files/bbs/2008/The_Monopoly_Regulation_and_Fair_Trade_ACT.pdf (last visited Mar. 18, 2011). It thus is unclear whether MOFCOM will treat mergers that would create combined market shares exceeding the thresholds for dominance set forth in Article 19 of the AML as presumptively anticompetitive.

128. *See* AML, art. 28. MOFCOM appears to take the view that whether the fact that "the positive effect of the concentration on competition obviously outweighs the negative effect" must be proven by the undertakings concerned but that the AMEAs may make exemption decisions based on public interest grounds on its own initiative. *See* MOFCOM, ANTIMONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA: INTERPRETATIONS AND APPLICATIONS (LAW PRESS CHINA 2007) (Hereinafter the MOFCOM Book on Interpretation of AML), at 249. However, the NPC appears to take a different view, indicating that both must be proven by the undertakings concerned. *See* NPC Book on Interpretation of AML, *supra* note 22, at 186.

129. Guanyu Xiangguan Shichang Jieding De Zhinan [Guidelines on Definition of Relevant Market by Anti-Monopoly Commission of the State Council (Guidelines on Definition of Relevant Market)], arts. 3–6.

Second, in the product market consisting of contact lens care products, MOFCOM found that the parties would have a combined China share of only 20%. But Novartis had an existing exclusive distribution agreement with a leading (30% share) competitor, which would have resulted in the combined entity's products also being distributed by that competitor. MOFCOM decided this created a risk of anticompetitive coordination between the competitor/distributor and Novartis/Alcon, and therefore required that Novartis terminate that pre-existing exclusive distribution agreement.

Conclusion. Although MOFCOM's public explanations for its decisions have remained brief and leave significant room for interpretation, they already demonstrate a considerable evolution over the very short period of time (less than two years between *InBev* and Novartis). Moreover, viewing the set of seven decisions as a whole shows, among other things, that:

- substantial horizontal overlaps, especially those resulting in combined market shares approaching 50 percent, are very likely to give rise to competitive concerns, even if the increment is very small (e.g. *Novartis*);
- MOFCOM shows especial concern, consistent with Article 27 of the AML, for effects on smaller competitors (e.g., *Coca-Cola*; *Lucite*; *Pfizer*) and customers (*Panasonic*);
- MOFCOM closely examines existing or potential future barriers to entry (*Coca-Cola*; *Pfizer*); supplier/customer lock-in (*GM*; *Lucite*); and other constraints on ready demand substitution (*Panasonic*);
- MOFCOM may consider, but also is capable of dismissing, countervailing arguments such as buyer power (*Panasonic*);
- the combination of well-known brands (and perhaps especially domestic ones) may raise significant concerns (*Coca-Cola*);
- vertical concerns that traditionally have not been given much weight in the United States and even Europe may be more relevant to MOFCOM, even in the absence of market power (e.g., *GM*); and
- substantial criticism or complaints—especially from domestic trade associations, competitors, customers, or suppliers when directed toward a merger or acquisition by major foreign companies—are likely to lead to, at a minimum, increased scrutiny and delay and possibly significant conditions on approval (*Coca-Cola*; *GM*; possibly others).[150]

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150. Caijing, Lessons to Learn from the *Coca-Cola/Huiyuan* Case, Mar. 30, 2009, *available in Chinese at* http://finance.sina.com.cn/chanjing/sdbd/20090330/160860428 76.shtml (last visited Mar. 8, 2011); 21cbh, GM's Buyback of Delphi Going through Anti-Monopoly Review, Sept. 23, 2009, *available in Chinese at* http://www1.21cbh.com/HTML/2009-9-23/HTML_UVV2RWP3AKAV.html (last visited Mar. 8, 2011). On the positive side, however, the experience with Chinese merger review to date appears to show that such complaints are highly unlikely to derail a proposed transaction in its entirety, and MOFCOM appears receptive to creative remedies proposals. Indeed, only one out of one hundred forty

Comparison of Office Depot's Prices in Two Florida Cities

Orlando, FL, *Sentinel* - Jan. 1997
(Three Superstores)

Leesburg, FL, *Daily Commercial* - Jan. 1997
(One Superstore)

Comparison of Staples' Prices in Two Virginia Cities

Charlottesville, VA, *The Daily Progress* Feb. 1997
(Two Superstores)

Fredericksburg, VA, *The Free Lance - Star* Feb. 1997
(One Superstore)

Office DEPOT

RETAIL PRICING MEMORANDUM

OFFICE DEPOT'S PRICING PHILOSOPHY

It is our philosophy to never be over priced versus our competition in any of the markets that we operate stores in across the United States and Canada. We do not have a predatory pricing plan in that we try to manipulate the pricing in these markets. Rather it is our plan to match the retails offered on identical or comparable products. It is also our plan to offer comparable savings on merchandise that we carry and is carried by the competition, but in a different case pack size.

Our company is divided up into Price Zones, the number of zones and the number of stores within any one of those zones varies with time. These pricing zones are not based off of geography or along district or regional boundaries. It is based off of what competition we have in that market, and the pricing structure that competitor is using in their stores. We have one pricing zone in our company that is made up of stores that do not have any superstore competition. That price zone is designated as Price Zone One. Zone one is very diverse geographically. It contains stores from the East Coast of Florida to the Northwestern corner of Washington State. This zone contains the highest priced stores in our company as these stores do not have any competition. If any one zone is higher than zone one it is zone 23 which is made up of our Hawaiian stores. This zone tends to have higher retails due to the increased costs associated with shipping products to them via sea and air.

The main competition that we as a compa
competition. At this time we recognize Sta
scale we also recognize Price-Costco and
pricing of catalogs, but we compete again
against Staples under both names that the
"Business Depot". In both the United State
competition. We compete against CompU
BrandsMart and Future Shop. These comp
advertised retails and any price matches u
also watch these competitors closely as th
notoriously price sensitive.

We have a number of programs in place a
our attention to a competitor with a lower r
Guarantee". This program is widely incorp
the same item in a com-titor the store is authorized to match that price and give the customer up to
55% of the

Our company is divided up into Price Zones ... *These pricing zones are not based off of geography or along district or regional boundaries. It is based off of what competition we have in that market, and the pricing structure that competitor is using in their stores.* We have one pricing zone in our company that is made up of stores that do not have any superstore competition. ... *This zone contains the highest priced stores in our company as these stores do not have any competition.*

PX139, at OD-47 008940

Staples 1996 Strategy

The long range plan incorporates reaching parity across key operating statistics

- Achieving revenue parity with ODP in both the retail and delivery operating units
  - -Retail sales per store adjusted for structural differences will achieve $8.5M
  - -Delivery will match ODP's market share of 19% in the the markets that we plan to complete
- Pricing parity will be achieved over the course of the next four years
  - -The total impact to margin is 100 bps;
    - 60 bps for existing ODP market overlaps
    - 40 bps for future ODP overlapping markets
- Additional margin erosion of 50 bps is assumed for increasing competitive pressure as market approaches saturation and there is an increase in three player markets
- Operating profit margins expected to
  - -N. American retail will b
  - expectations for ODP at 8
  - -Contract & Commercial's
  - ODP's expected 5.1%
  - -Contingency held at 40 b

- Pricing parity will be achieved over the course of the next four years
  - -The total impact to margin is 100 bps;
    - 60 bps for existing ODP market overlaps
    - 40 bps for future ODP overlapping markets
- Additional margin erosion of 50 bps is assumed for increasing competitive pressure as market approaches saturation and there is an increase in three player markets

bps=1/100th of 1%
ODP=Office Depot

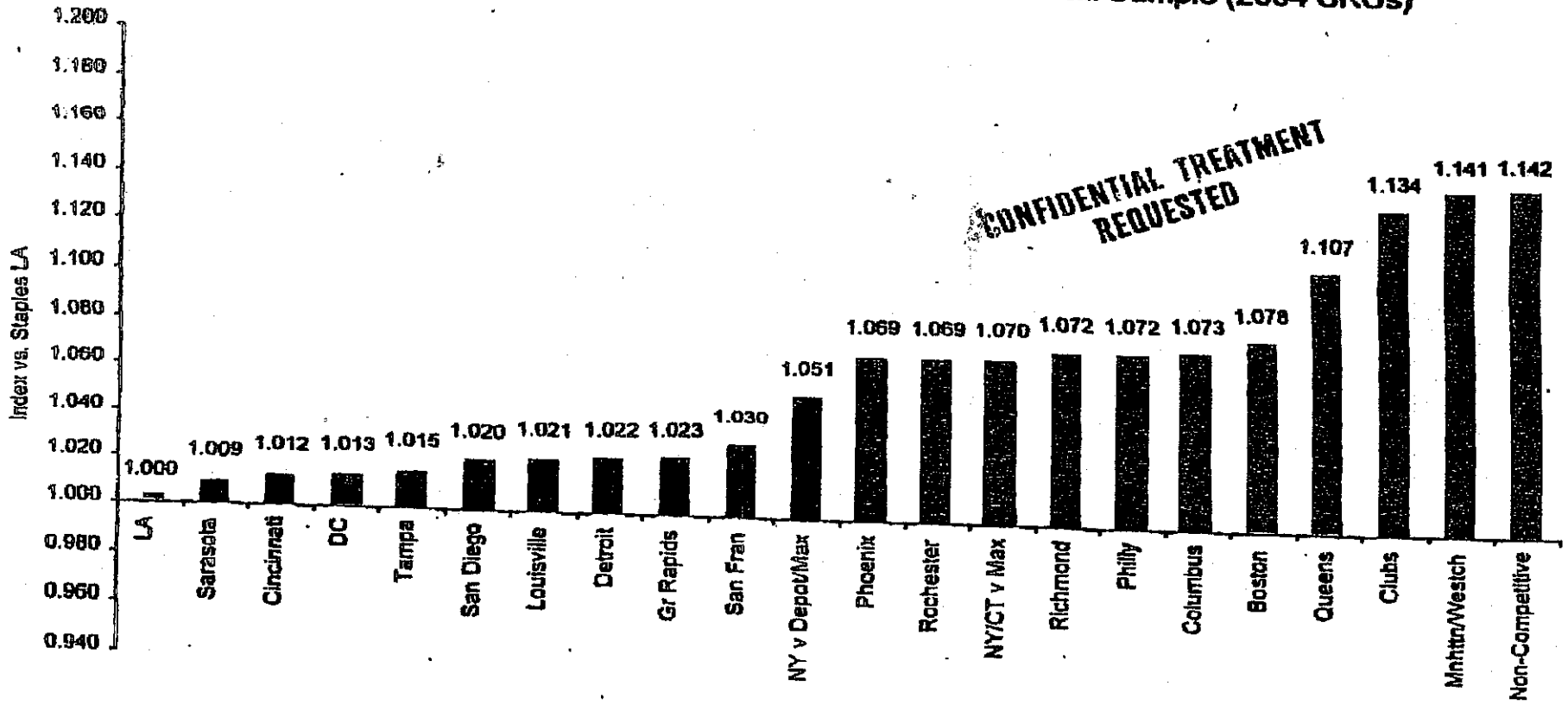
PX14, at SAS015501

Office Depot Pricing

Summer 1996

Staples Pricing Across Zones

Total Sample (2084 SKUs)



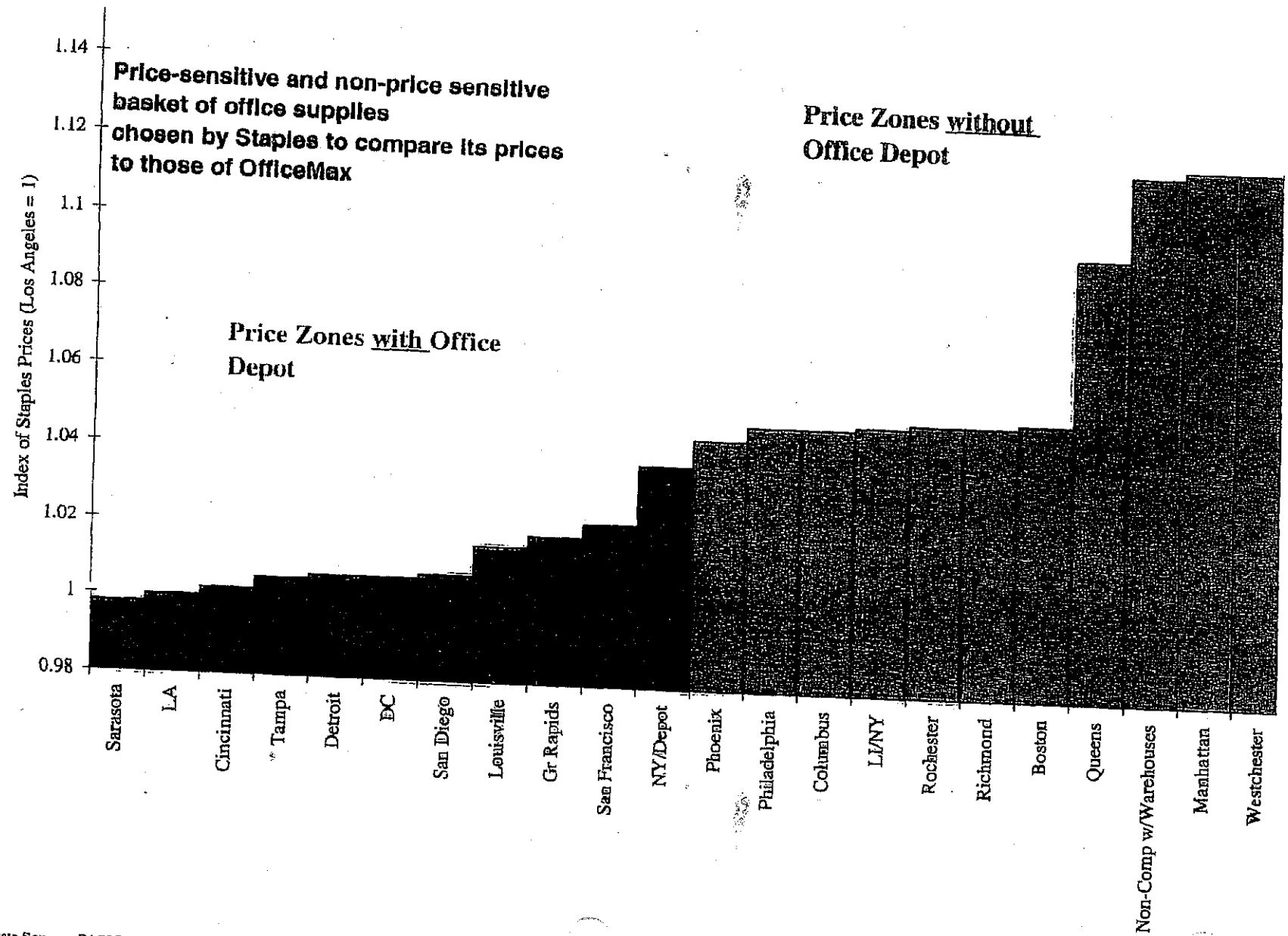
CONFIDENTIAL TREATMENT REQUESTED

May 1996

STP039579

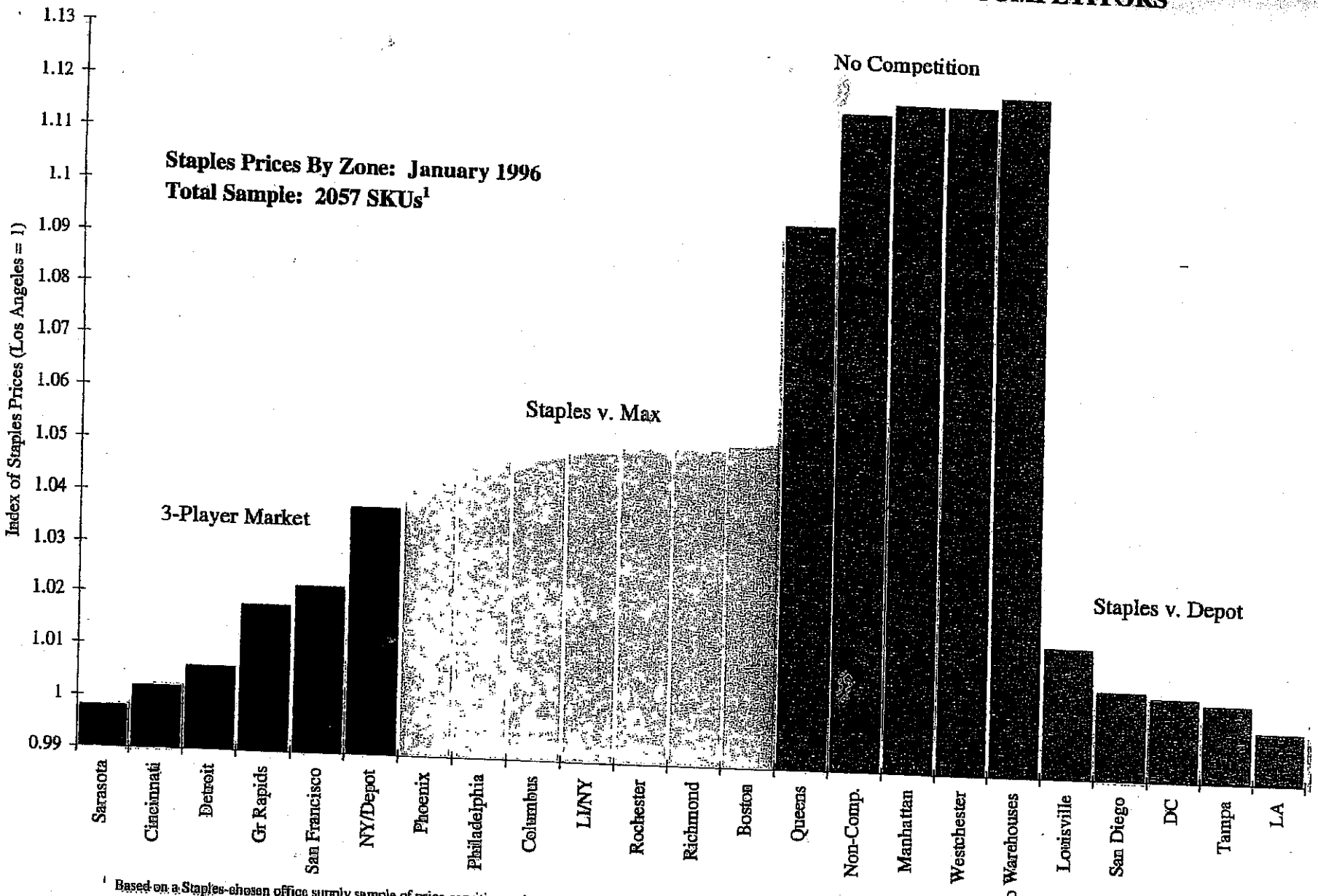
STAPLES' PRICES ARE LOWER WHERE OFFICE DEPOT IS IN THE MARKET

STAPLES' PRICES, BY ZONE: JANUARY 1996



Data Source: SAS051285

STAPLES' PRICES ARE HIGHER FACING FEWER SUPERSTORE COMPETITORS

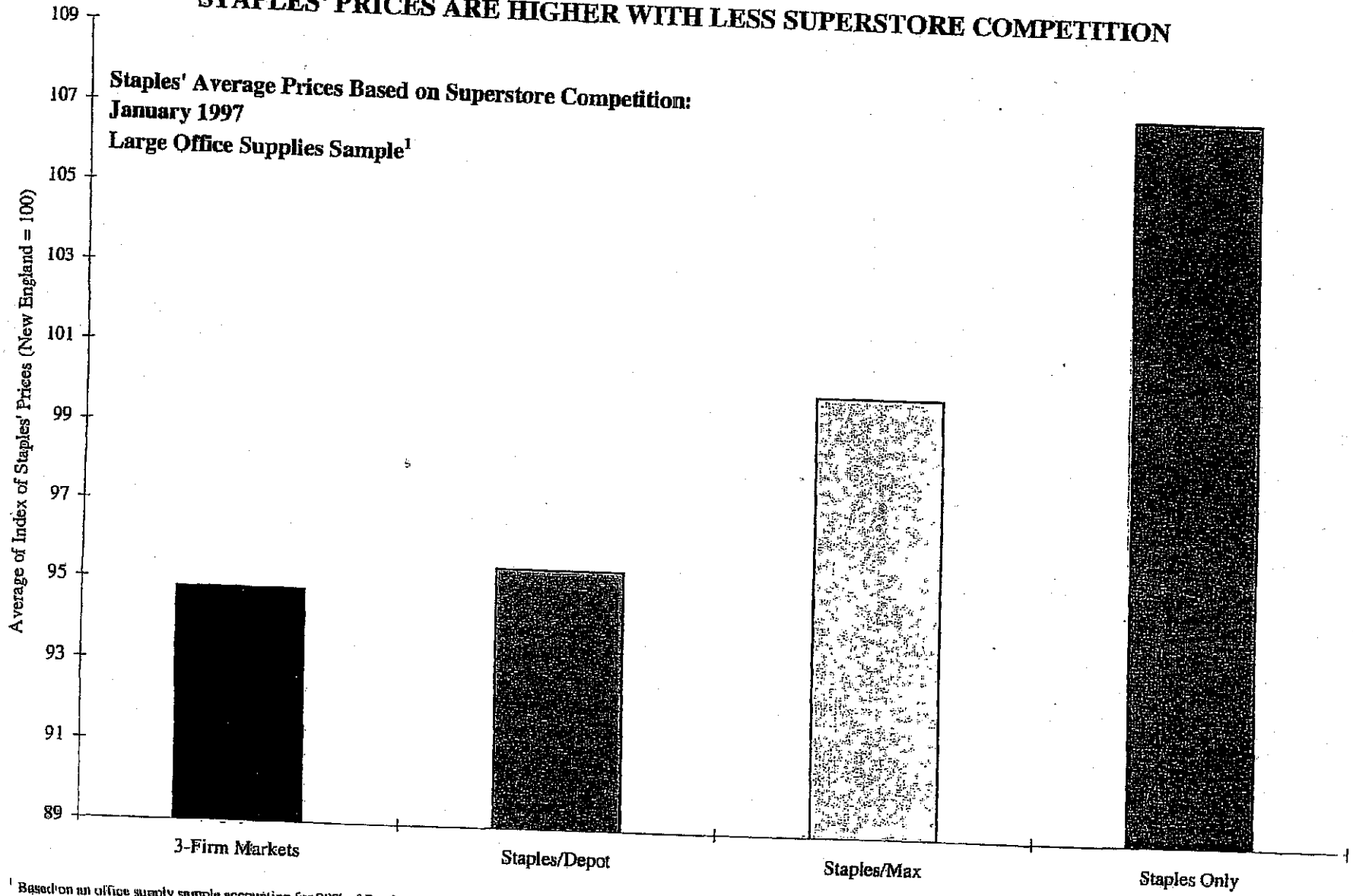


[1] Based on a Staples-chosen office supply sample of price-sensitive and non-price sensitive items that Staples uses to compare its prices to those of its competitors. Data source attached (SASQ51285).

STAPLES
The Office Superstore

STAPLES' PRICES ARE HIGHER WITH LESS SUPERSTORE COMPETITION

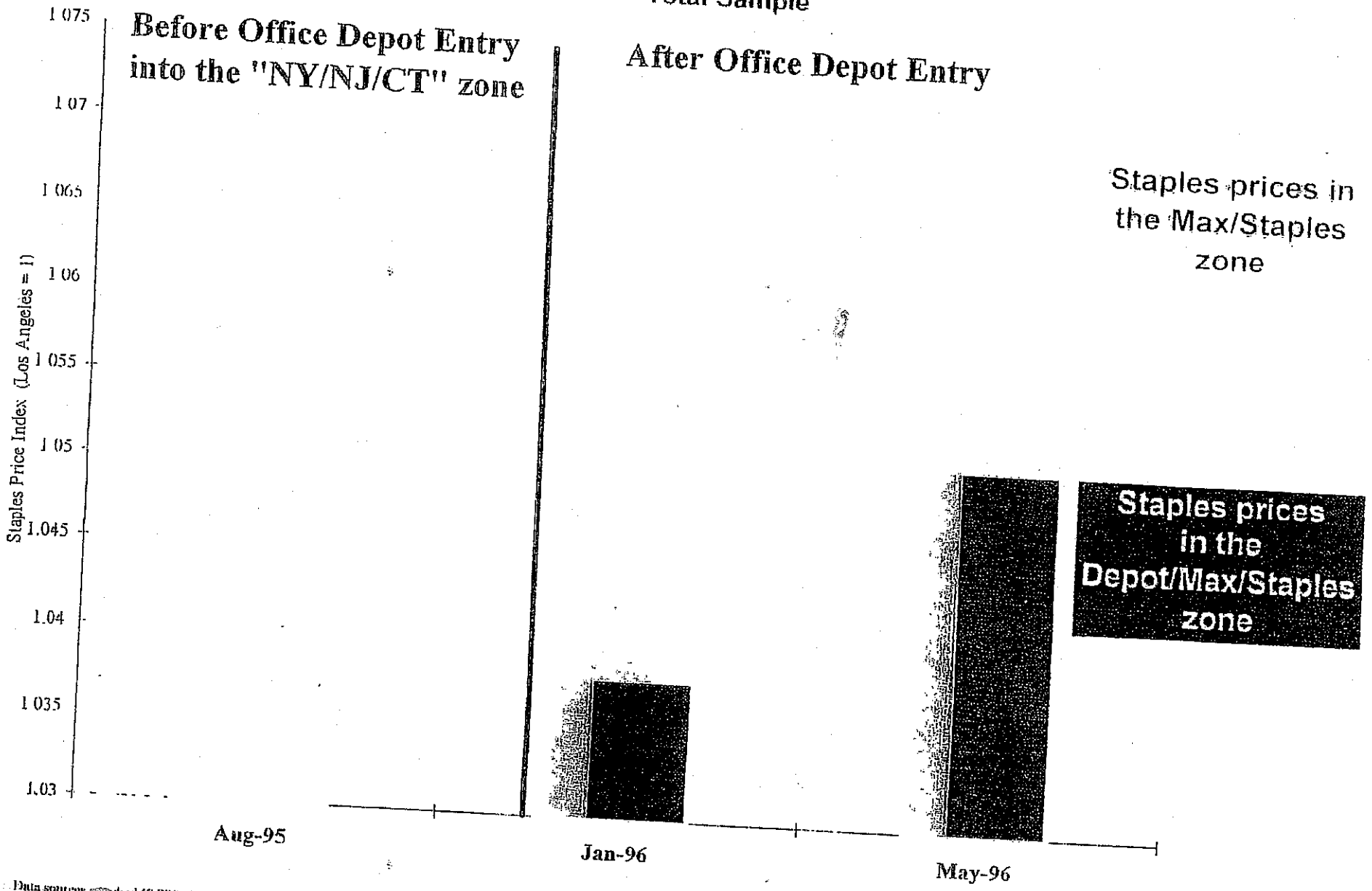
Staples' Average Prices Based on Superstore Competition:
January 1997
Large Office Supplies Sample[1]



[1] Based on an office supply sample accounting for 90% of Staples' sales.
Data source: PX-117

STAPLES LOWERS PRICES IN RESPONSE TO OFFICE DEPOT ENTRY

Total Sample



Data sources: ched (STP039579, SAS051285 STP080835)

DAY 8, WEDNESDAY, JULY 9, 2014

1. BOOK CHAPTERS

    1. AML and Practice in China (pgs. 90-91; 94-96; 106-110; 117-122)

    2. EVIDENCE FROM FTC V. STAPLES CASE (SEE DAY 7)

While the competition rules of most countries governing cartels and reviews of mergers have seen substantial convergence, a certain degree of divergence persists among the laws of many jurisdictions with regard to the unilateral conduct of firms that have "market power," or are "dominant."[1] Substantial differences remain with regard to which firms should be considered dominant, and therefore subject to more restrictive rules of conduct, as well as whether certain types of dominant firm conduct should be prohibited. Many of these differences reflect differences in economic circumstances, cultural values, and legal traditions, and should not be expected to be abandoned for the sake of convergence alone.[2]

The Anti-Monopoly Law (AML)'s abuse of dominance provisions are modeled primarily after Article 102 of the Treaty on the Functioning of the European Union (TFEU),[3] with a market share-based set of presumptions of dominance that appear to be based on German competition law, and including the concept of collective dominance. This and other language in the statute, discussed in this chapter, seem to indicate that China's approach is likely to be more consistent with the historical approach taken by the European Commission and the EU courts, with greater government intervention in the markets, and an enforcement policy not focused solely on consumer welfare, but also directed at preserving market structure and policing the "fairness" of competitive conduct.[4] Abuse of a dominant market position is one of the

1. *See* Russell W. Damtoft & Ronan Flanagan, *Symposium: The Rise of Transnational Networks: The Development of International Networks in Antitrust*, 43 INT'L LAW. 137, 148 (2009) ("[C]onsensus about unilateral conduct . . . lags behind within the international antitrust community."). The International Competition Network (ICN) Unilateral Conduct Working Group has published a paper describing the fundamental concepts that most jurisdictions recognize as appropriate components of assessment of abuses of a dominant position. *See* Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, *available in English at* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf (last visited Mar. 15, 2011). With regard to divergence in the treatment of single firm conduct in a number of significant jurisdictions, see A. Neil Campbell & J. William Rowley, *The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L. J. 267 (2008).
2. *See* David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT'L L. 161, 181–82 (2009); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277 (1992).
3. Yin Zhou, *China's Anti-Monopoly Law: Insights from U.S. and EC Precedents on Abuse of Dominance and IP Exemption Provisions*, 32 HASTINGS INT'L & COMP. L. REV. 711, 715 (2009).
4. Though the European Union appears now to be moving toward more of an effects-based, consumer-welfare driven approach, it is unclear whether that development will influence China's application of the provisions in the AML that would appear to authorize a more interventionist approach. *See* Guidelines on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings ("Commission Guidelines on Article 102 TFEU"), Feb. 24, 2009, 2009 O.J. (C 45/7), ¶ 6 (noting that "the Commission is really mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who

three types of conduct defined by Article 3 as "monopolistic conduct" to which the AML is applicable.

An abuse of dominance violation requires both that (i) a competitor (or group of competitors) have a dominant position in a relevant market, and (ii) that the dominant entity or entities have abused that dominant position by engaging in conduct defined as abusive in the AML, or other conduct recognized as abusive by the Anti-Monopoly Enforcement Authority (AMEA).

Both the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC) have asserted jurisdiction over enforcement of certain aspects of the abuse of dominance provisions, the precise boundaries of these agencies' jurisdictions being unclear as of this writing.[5] Both the SAIC and NDRC have promulgated rules providing additional guidance regarding the interpretation and enforcement of the abuse of dominance provisions.[6] Abuses of dominance are subject to substantial fines and orders to cease violations as well as civil liability.[7] Parties found by one of the agencies to have violated the abuse of dominance provisions may seek reconsideration of the decision by the agency or appeal directly to a court by instituting an administrative lawsuit.[8]

I. Assessment of a Dominant Market Position

A. Market Definition

The traditional starting point of assessment of the "dominance" of any firm is the proper definition of a relevant market over which a firm is alleged to be

deliver less to consumers in terms of price, choice, quality and innovation will leave the market"). For a discussion of protection of consumer welfare under the China Anti-Monopoly Law, *see* Xinzhu Zhang & Vanessa Yanhua Zhang, *The Antimonopoly Law in China: Where Do We Stand?*, 3 COMPETITION POLICY INT'L 185 (2007).

5. *See* Chapter 7 of this book.
6. Guanyu Jinzhi Lanyong Shichang Zhipei Diwei De Youguan Guiding [SAIC Rules on the Prohibition of Abuses of a Dominant Market Position] (SAIC Rules on the Prohibition of Abuses of Dominance) (published by SAIC, January 6, 2011), *available in Chinese at* http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html (last visited Feb.1, 2011) (P.R.C.); Fan Jiage Longduan Guiding [NDRC Anti-Price Monopoly Rules (NDRC Anti-Price Monopoly Rules)] (published by NDRC, January 4, 2011), *available in Chinese at* http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/t20110104_389393.htm (last visited Feb.1, 2011) (P.R.C.).
7. AML, art. 47.
8. AML, art. 53.

the competitive price, necessitating the ad hoc use of various approaches depending on market circumstances and data available.[21]

The AMC guidelines note the "significant importance" of the appropriate definition of a relevant market for key issues, including identification of competitors and potential competitors, determination of market shares and degree of market concentration, determination of the market position of the entities involved, and the lawfulness of firms' competitive conduct, and emphasize the definition of the relevant market is often the "starting point for competition analysis."[22]

B. Definition of Dominance

Under the AML, a dominant market position is defined as the ability to control the price or output of products or other trading conditions in the relevant market or to block or affect the entry of other undertakings into the relevant market.[23] This comports textually with the approach under U.S. antitrust law, which defines the similar concept of monopoly power as "the power to control prices or exclude competition."[24] Textual similarity with statutory provisions of other jurisdictions, however, is not necessarily determinative of

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products in response to a small but significant increase in the price of cellophane. By failing to recognize that a high own-elasticity may mean that a firm is exercising monopoly power, the Court failed to understand that the price that was being charged was not a competitive price, but a monopoly price. See also the European Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, ¶ 19.

21. *See* R. O'Donoghue & A. J. Padilla, The Law and Economics of Article 82 EC (Hart Publishing 2006) (hereinafter, O'Donoghue & Padilla) at 81–84 (asserting that there is "no single best solution" to determining a competitive price and thereby avoiding the cellophane fallacy, and recommending one or more of the following approaches, depending on the extent to which prices appear to already exceed the competitive level, based on consideration of qualitative criteria and experience in similar markets: (1) estimate the competitive price before undertaking a critical loss analysis; (2) use a combination of qualitative and quantitative evidence; (3) use other comparable markets as a crosscheck; (4) examine the competitive reactions of the allegedly dominant firm; and (5) use the small but significant non-transitory *decrease* in prices (SSNDP) test.).
22. AMC Market Definition Guidelines, art. 2.
23. AML, art. 17.
24. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1959). Though the AML was heavily influenced by EU law, the definition of market power appears to be modeled on U.S. law, not EU law. Under EU law, the European Court of Justice has defined a dominant position, to be "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers." Case 27/76 *United Brands v. Commission* [1978] E.C.R. 207.

a competition system's competition policy or the implementation of the law.[25]

The SAIC and NDRC Rules further explain that "other trading conditions" refer to elements other than price and output that may substantially affect market transactions, including product quality, payment conditions, delivery method, after-sale service of the product, transaction options and technical constraints.[26] These considerations are either components of price (such as payment conditions, including credit terms) or distinguishing attributes of the product sold by the putatively dominant firm, which may demonstrate that entity's substantial control over the terms of trading in a relevant market. The SAIC Rules also state that "to block or affect the entry of other undertakings into the relevant market" means preventing or deferring other undertakings' entry into the relevant market within a reasonable time, or increasing[27] the market entry cost, thus making it difficult[28] for a new entrant to compete effectively with the incumbents, even if entry into the relevant market is possible.[29] The AML's reliance on an assessment of barriers to entry as an alternative to proof of control over prices or output generally adheres to the approaches taken by other major jurisdictions.[30]

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25. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 16 (1997) ("[D]isparate antitrust treatment, where it occurs, normally results not from different formulations of the principles but from the different meanings given to specific key words—particularly, 'anticompetitive' and 'abuse'—and different methodologies for defining markets and assessing market power. These differences in treatment are not apparent in the literal words of the antitrust rules; the rules could have exactly the same wording and the differences would persist. The persistent differences tend to be based on matters of principle....").
26. SAIC Rules on the Prohibition of Abuses of Dominance, art. 3; NDRC Anti-Price Monopoly Rules, art. 17.
27. Article 17 of the NDRC Rules on Anti-Price Monopoly indicates that the barrier should "significantly" increase the costs of market entry.
28. Article 17 of the NDRC Rules on Anti-Price Monopoly uses the word "impossible" compared to "difficult" in the SAIC Rules.
29. SAIC Rules on the Prohibition of Abuses of Dominance, art. 3; NDRC Anti-Price Monopoly Rules, art. 17.
30. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 591, n.15 (1986) (defining barriers to entry as either a cost that would have to be borne by an entrant that was not borne by the dominant incumbent, or any condition that will likely inhibit other firms' entry into the market in response to an increase in the incumbent's price); J. FAULL & A. NIKPAY, THE EC LAW OF COMPETITION ¶ 4.60 (2d ed. Oxford University Press 2007) (hereinafter, FAULL & NIKPAY) (noting that the European courts have not provided a "clear definition of the concept of barrier to entry," but citing to decisions in which the courts have based decisions about dominance on various types of entry barriers, including: legal and administrative barriers, certain types of intellectual property rights, sunk costs of entry, economies of scale, a lead in technology or research and development, strength of the dominant firm's brands, switching costs for customers, wide geographical presence of the dominant firm, financial resources, and product range or differentiation).

Though the statutory definition of a dominant market position does not expressly address the question, the fact that buying products at "unfairly low prices" is included within the AML list of potential abuses of dominance[31] appears to indicate that the AML recognizes possible buyer dominance (for example in the case of a monopsony) as well as seller dominance. Though the concept of buyer dominance is recognized in U.S. law,[32] monopsony power is assessed on the basis of whether the buyer can reduce the purchase price by reducing its purchases, lowering output, and thereby harming consumer welfare.[33] In the European Union, it is also recognized that purchasers may abuse their dominant position by extracting unfairly low prices.[34]

C. Presumptions of Dominance Based on Market Shares

Under Article 19, dominance is presumed if: (1) one of the entities has ≥ 1/2 market share; (2) two entities jointly have ≥ 2/3 market share; (3) three entities jointly have ≥ 3/4 market share.[35] This provision raised great concern

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31. AML, art. 17(1).
32. *See generally* R. D. Blair & J. L. Harrison, Monopsony: Antitrust Law & Economics (1993); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669 (Princeton University Press 2005). *See also* Roundtable on Monopsony and Buyer Power, OECD, DAF/COMP/WD 79 (2008) (U.S. Note), and cases cited therein, *available at* http://www.ftc.gov/bc/international/docs/monopsony.pdf (last visited Mar. 15, 2011).
33. Areeda & Hovenkamp, supra note 16, ¶ 575, n. 1 ("While the monopolist maximizes profits by equating marginal cost and marginal revenue, the monopsonist equates its own demand curve to its marginal outlay. Marginal outlay is in fact marginal revenue turned upside down—that is, as the firm buys less, the price it pays for each unit declines. By contrast, if a firm has no market power on the buying side, its purchases have no effect on the price.").
34. *See* Case C-298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v. Commission, [1985] E.C.R. 1105.
35. The provision appears to be based on German competition law, although the German thresholds are substantially lower albeit rarely utilized. *See* Wang Xiaoye, *Highlights of China's New Anti-Monopoly Law*, 75 Antitrust L.J. 133, 138–39 (2008) ("The source of these presumptions can be traced to the German Act Against Restraints of Competition.") (citations omitted). *See also* Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition, ARC) (GWB) in the version of July 15, 2005 (Bundesgesetzblatt (Federal Law Gazette) I 2005), at 2114 (in the following referred to as BGBl.), last amended by Article 8 of the Act of Mar. 17, 2009 (BGBl. I 251, at 550), *available on the Bundeskartellamt website, in English, at* http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf (last visited Mar. 15, 2011) ("An undertaking is presumed to be dominant if it has a market share of at least one-third. A number of undertakings will be presumed to be [collectively] dominant if it: 1. consists of three or fewer undertakings reaching a combined market share of 50 percent, or 2. consists of five or fewer undertakings reaching a combined market share of two thirds, unless the undertakings demonstrate that conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors."). *Cf.* the presumptions of dominance under the Republic of Korea Monopoly Regulation

II. Conduct that May Constitute Abuses of a Dominant Market Position

Article 17 of the AML provides a nonexhaustive list of prohibited abuses of a dominant market position.

Most commentators believe, and recent court decisions seems to confirm, that proof of an effect of elimination or restriction of competition, as set forth in Article 6 AML,[72] will be required as an element of an abuse of a dominant position, despite the fact that those elements are not expressly included in the specific descriptions of conduct that constitutes an abuse in Article 17.

In addition, unlike the monopoly agreement provisions, the abuse of dominance provisions do not provide for exemptions for abuses that are undertaken for specified beneficial purposes. However, some, but not all, of the defined abuses require the absence of a legitimate or valid justification for the conduct, so that certain kinds of otherwise abusive conduct may avoid prohibition based on such justification. Those categories of abuse will apparently, in essence, be assessed under a kind of rule of reason, in which the agency or court may not condemn the conduct because it is shown to be justified.[73] The NDRC Anti–Price Monopoly Rules and the SAIC Rules on the Prohibition of Abuses of Dominance provide further guidance on the specific nature of conduct prohibited under each of these categories.

While the NDRC Anti-Price Monopoly Rules provide some potential valid justifications for several of the listed types of abusive conduct, the SAIC Rules on the Prohibition of Abuses of Dominance provide only a general description of what might constitute a valid justification. In particular, Article 8 of the SAIC Rules provides that, when determining the existence of a valid justification, SAIC will consider (i) whether the activities are based on "normal operations and for normal benefits of the undertaking," and (ii) the effect of the relevant activities on economic efficiency, public interest and economic growth.

A. Unfairly High Prices and Unfairly Low Prices

Article 17(1) of the AML prohibits undertakings with a dominant market position to sell products at unfairly high prices or to buy products at unfairly low prices. This conduct is the only specific abuse for which the AML does

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72. Article 6 AML specifically prohibits undertakings with a dominant market position from abusing their dominant position "to eliminate or restrict competition".

73. *See, e.g.*, Wu Zhenguo, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. (2008), at 85 ("The principle of 'rule of reason' analysis shall be adopted to determine if the practices listed above are abuses of dominant market positions.").

not expressly permit exculpation through a showing of a valid justification. While the European Union and some other jurisdictions prohibit unfairly high pricing[74] as an "exploitative abuse," enforcement of such provisions is rare and almost always in the context of a separate abuse of dominance.[75] According to established European case law, a price will be considered unfair when it is excessive in relation to the economic value of the product.[76] In contrast, to impose liability upon a firm for unilaterally setting prices, and to permit regulatory agencies to second-guess the fairness of such prices, runs counter to a central tenet of U.S. competition policy—that it is the market that determines the appropriate price.[77] China, however, has a history of regulating prices directly. As a consequence, it seems likely that the AMEAs will consider price levels in making determinations of dominance.[78]

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74. *See* TFEU, art. 102(a) (an abuse of a dominant position may consist of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"); Act on Prohibition of Private Monopolization and Maintenance of Fair Trade [Japan's Anti-Monopoly Act], Act No. 54 of Apr. 14, 1947, *available in English at* http://www.jftc.go.jp/e-page/legislation/ama/amended_ama09.pdf (last visited Mar. 16, 2010), art. 2(9) (defining as an unfair trade practice "dealing at unjust prices"); European Commission, FIFTH REPORT ON COMPETITION POLICY (Brussels and Luxembourg 1975), point 3 ("[M]easures to halt the abuse of dominant positions cannot be converted into systematic monitoring of prices.") The imposition of excessively low purchase prices by the dominant purchaser may also be considered as an abuse of a dominant position. *See* Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v. Commission [1985] E.C.R. 1105. Excessive prices, in the context of an essential facility, for example, may also be exclusionary. *See* Napier Brown/British Sugar, 1988 O.J. 284/41, [1990] 4 C.M.L.R. 196.

75. See European Commission, XXIV Report on Competition Policy (1994), at point 207 ("The Commission in its decision-making practice does not normally control or condemn the high level of prices as such.").

76. *See, e.g.*, Case 27/76, United Brands v. Commission, [1978] E.C.R. 207, ¶ 250. *See also* O'DONOGHUE & PADILLA, *supra* note 21, at 642 ("[T]here is no objective method to determine when a selling price is "fair." This applies a fortiori to determining a "fair" buying price. Unless the dominant firm is making a loss in the relevant output market—which can be assessed under traditional principles of predatory pricing rules—economics does not allow easy identification of when input prices are 'too high'").

77. *See* Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 ANTITRUST BULL. 343, 345 (2004) ("U.S. law sets a straightforward rule: monopoly pricing, as such, is not regulated. In contrast, under European Community (EC) law excessive pricing is considered an abuse of dominance and is punishable by fine and subject to prohibitory order. These approaches fit the divide between the regulation of exclusionary and exploitative conduct: whereas exclusionary conduct is an offense against antitrust law on both sides of the Atlantic, exploitative conduct generally only breaches EU law.").

78. For example, the profitability of the undertaking will be taken into account when evaluating the financial status of the relevant undertaking for purpose of dominance. *See* article 10(3) of the SAIC Rules on the Prohibition of Abuses of Dominance (the "financial conditions" under article 18(3) of the AML to determine dominance include the relevant undertaking's capital scale, financial position, profitability and financing capability).

The AML itself provides no definition or guidance on how to assess whether a price is "unfair," apparently reflecting the lingering desire of the Chinese government to retain the power to regulate pricing, even in nominally unregulated markets. The NDRC Anti–Price Monopoly Rules attempt to clarify what may constitute "unfairly low or unfairly high" prices. However, the terms used in the rules, such as "obviously higher," do not really provide more predictability about what price levels will be deemed unfair by the AMEAs, rendering compliance problematic. The specific factors for determining unfairness as provided by the NDRC Rules are as follows, and are to be evaluated as a whole:

- The selling price is obviously higher, or the buying price is obviously lower, than that charged or paid by other undertakings to sell or purchase the same type of products;
- Raising the selling price or lowering the buying price by a percentage above the normal level where costs are basically stable;
- The selling price of the product is increased with a percentage obviously larger than the increase of the cost, or the buying price is decreased with a percentage obviously larger than the decrease of the costs of the trading counterparty;
- Other relevant factors that need to be considered.[79]

These measures do not address what should be the fundamental concern of competition policy—consumer welfare—and, in practice, are likely to punish or deter competitive conduct that would benefit consumers (such as competition by the dominant firm based on non-price factors such as increased quality or features or decreased costs), thus harming rather than serving the competitive process. In particular, they appear to make the reasonableness or fairness of pricing by a dominant competitor dependent upon both the pricing of other competitors and upon the dominant competitor's costs, rather than whether the prices were obtained through competitive setting in the marketplace and/or reflect legitmate differences in quality, cost, or other factors.

No rules or guidelines promulgated to date address how, if at all, the AML prohibitions of "unfair" low prices, the imposition of "unreasonable trading conditions," and exclusive dealing may be invoked to prohibit price (or margin) squeezes. "Price squeezes" or "margin squeezes," occur when a dominant firm that operates at two levels of the market (the wholesale and retail levels, for example) "squeezes" the profit margin of its retail rivals by raising the wholesale prices to retail competitors while selling at retail at prices that

79. NDRC Anti–Price Monopoly Rules, art. 11. See also Article 14 prohibiting "refusals to deal in a disguised form by setting excessively high prices". See Section III.C. below.

leave the retail rivals without an opportunity to make a profit. The U.S. Supreme Court has rejected price squeezes as a basis for Section 2 liability except in the rare cases where a seller has a duty to deal with the disadvantaged rival.[80] Guidance through rules or precedent would be useful to understand how the AML will be applied to price squeezes.

B. Selling at Prices Below Cost (Predatory Pricing)

Article 17(2) of the AML provides that without valid justification, it is prohibited for the undertakings with a dominant market position to sell products at prices below cost.[81] The European Union and United States recognize predatory pricing as a possible abuse. The United States requires, as an additional element, proof of recoupment—i.e., that the predatory firm be able to recoup the profits it has foregone during the predatory period by charging supracompetitive prices after its rivals have been driven from the market or marginalized. The European Union does not require proof of recoupment.[82] The AML seems to adumbrate an approach more consistent with EU law, under which there is no requirement that an ability to recoup be proven.[83]

The AML also does not adopt a specific measure of cost to be used to determine whether pricing is predatory. Under EU law, prices are presumed to be predatory when they are below average variable cost.[84] The U.S. Supreme

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80. Pacific Bell Tel. Co. v. Linkline Communications, Inc., 555 U.S. 438 (2009). The theory has been recognized under EU law. Case C-280/08, Deutsche Telekom v. Commission (not yet reported) (confirming that a price squeeze is a standalone violation of Article 102 TFEU). *See* Serge Clerckx & L. De Muyter, *Price Squeeze Abuse in the EU Telecommunications Sector: A Reasonably or Equally Efficient Test?*, GLOBAL COMPETITION POLICY Release 1, at 1 (April 2009).
81. The Anti-Unfair Competition Law and the Price Law both prohibit selling below cost. *See* discussion in Chapter 9 of this book.
82. *Cf.* Case C-333/94P Tetra Pak International SA v. Commission (Tetra Pak II) [1996] E.C.R. I-5951, ¶ 44; Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).
83. *See* France Telecom S.A. v. Commission, Case C-202/07 P [2009] E.C.R. I-2369 (confirming that under EU law it is unnecessary to show that a dominant undertaking must have a reasonable prospect of recouping its losses in order to prove an abuse of dominance through predatory pricing).
84. The European Court of Justice enunciated two tests of unlawful predatory pricing, based on two alternative measures of cost. Where prices are below average variable cost, the conduct is presumed to be predatory, and therefore abusive, because, according to the Court, the only conceivable reason for a firm to price at this level is to exclude one or more competitors from the market. Where prices are below average total cost, but above average variable cost, they will not be deemed predatory, except where evidence establishes that they are part of a specific plan to exclude competitors, thus requiring proof of intent. Case C-62/86, AKZO Chemie BV v. Commission [1991] ECR I-3359, para. 71.

Court has required a cost-based analysis, but has not specified any specific measure of cost, though average variable cost, as a proxy for reasonably anticipated marginal costs, has been frequently invoked by lower courts.[85]

Article 12 of the NDRC Anti–Price Monopoly Rules provides a nonexhaustive list of circumstances that may constitute a valid justification for below-cost pricing, as follows:

- Selling at a reduced price fresh or living goods, seasonal products, products with coming expiry date or overstocked products;
- Selling at a reduced price for the repayment of debts, change of business, or closing down;
- Sales promotion in order to disseminate new products;
- Other grounds that can justify the conduct;

These justifications generally describe short-term strategies intended to avoid losses in unusual market conditions. Below-cost pricing for short periods is unlikely to drive competitors from the market, and also would be based on nonexclusionary intent.

C. Refusals to Deal

Article 17(3) of the AML prohibits undertakings with a dominant market position from refusing to deal with trading partners without valid justification. The SAIC Rules on the Prohibition of Abuses of Dominance interpret the notion of a refusal to deal to include (1) reducing current trade volume with the counterparty; (2) deferring or terminating current transactions with the counterparty, (3) refusing to have any new transaction with the counterparty, (4) imposing restrictive conditions which make it difficult for the counterparty to continue its dealings with the said undertaking, (5) refusing to allow the counterparty to use an essential facility under reasonable conditions in the course of production and operations.[86] It therefore appears that a dominant firm may have a duty to continue to deal with a counterparty unless it can provide justification for the change in the trading relationship.

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85. Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–25 (1993) (requiring a cost-based test); Stearns Airport Equipment Co. v. FMC Corp., 170 F.3d 518, 532 (5th Cir. 1999) (holding that a price is not predatory unless it is below average variable cost). The use of reasonably anticipated marginal costs, and of average variable costs as a proxy because marginal cost is difficult to measure, was proposed by Professors Areeda and Turner in a 1975 article. The test is often referred to as the Areeda-Turner test. *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

86. SAIC Rules on the Prohibition of Abuses of Dominance, art. 4.

under equivalent conditions without a valid justification. "Equivalent conditions" refers to an equivalent or similar transaction in terms of volume, transaction method, payment, and after-sales service, when purchasing products of the same or similar quality and grade. According to the jurisdiction allocation between NDRC and SAIC, price discrimination might fall under the jurisdiction of NDRC and discrimination in other terms might fall under the jurisdiction of SAIC. Therefore both agencies issued rules relating to Article 17(6) of the AML.

The NDRC rules limit the prohibition to discrimination between trading counterparties that are in "equivalent conditions." The Chinese term, 条件相同, is the same that is translated as "on an equal footing" in Article 17(6) of the AML.

Article 7 of the SAIC Rules on the Prohibition of Abuses of Dominance explains that differential treatment may apply to the following conditions:

- offering different trade volumes, grades, qualities,
- offering different preferential conditions, such as different quantity-based discounts,
- applying different terms of payment and method of delivery,
- applying different after-sales service conditions, such as different warranty services and warranty period, different maintenance items and maintenance period, different spare parts supply and technical instructions.

G. Abuses of a Dominant Market Position Involving Intellectual Property

Abuses of dominant position involving intellectual property (IP) rights are discussed in Chapter 6 of this book.

III. Court Decisions

Article 50 of the AML provides that undertakings that violate the AML shall bear civil liability, establishing a private right of action for civil litigation to redress AML violations.[109] As of this writing, only a handful of court decisions

109. For a detailed discussion of the courts to which AML cases have been assigned and the structure and procedures of the Chinese court system, see Chapter 8 of this book.

in abuse of dominance cases have been announced, though there have been reports of other cases that have been resolved through settlement.[110]

The first abuse of dominance case was filed on August 1, 2008, the day that the AML came into force, by Mr. Li Fangping, a customer of China Netcom, against China Netcom's Beijing Branch (Netcom). The complaint, which was transferred to the Beijing No. 2 Intermediate People's Court, alleged that Netcom had abused its allegedly dominant market position by discriminating in terms of service against customers who are not permanent Beijing residents. Specifically, the suit alleged that Netcom required that the plaintiff either prepay his telephone service bills or provide Netcom with a guarantee, and refused to provide the plaintiff with certain discounts and preferential packages offered by Netcom to permanent residents of Beijing. Mr. Li alleged that these disparate terms and conditions violated the prohibition, in Article 17(6), against "without justifiable reasons, applying differential prices and other transaction terms among their trading counterparts who are on an equal footing. . ." According to press reports, Netcom argued that the requirement of a guarantee or prepayment is not discriminatory but is intended to avoid problems in collecting debt from nonresident customers, and that customers who were permanent residents of Beijing but had poor payment histories were also required to prepay. Netcom also argued that customers who were not permanent residents were given the same treatment as residents if they own real estate in Beijing. On December 24, 2009, the court held that the plaintiff failed to prove that Netcom had a dominant market position, that the payment plans were not substantially different, and that, based on its claimed rationale of avoiding debt collection problems, Netcom had the right to restrict to certain customers the right to pay after telephone services were provided.

Another important early case was filed by Beijing Sursen Electronic Technology Co (Sursen) against Shanda Interactive Entertainment and

110. *See, e.g.*, the *China Mobile* case, in which China Mobile Limited (China Mobile) filed an action against a China Mobile customer, who in turn alleged that China Mobile had abused its dominant position in the China cellular telephone service market by charging customers monthly service fees in addition to usage fees and by charging subscribers different fees for substantially similar services. The customer sought damages equal to his basic mobile fees for the last year and an order requiring China Mobile to stop charging the plaintiff monthly service fees. The case was accepted by the Beijing Dongcheng District People's Court, which held a hearing on the matter and, shortly thereafter, transferred the case to the Beijing No. 2 Intermediate People's Court. On Oct. 23, 2009, the customer and China Mobile settled the dispute, agreeing that the customer's phone service would be transferred to the service without monthly service fees and that China Mobile would pay the plaintiff RMB 1000, called a "bonus" for helping China Mobile to improve its service. The customer withdrew his lawsuit from the Beijing No. 2 Court. *See* China Mobile Involved in Anti-Monopoly Litigation for the First Time, http://www.tech.163.com, Apr. 3, 2009, *available in Chinese at* http://tech.163.com/09/0403/10/55VFPROI000915BE.html (last visited Mar. 16, 2011).

Shanghai Xuanting Entertainment Information Technology (collectively, Shanda; separately, Shanda and Xuanting). Sursen operates a web portal, http://www.du8.com. The defendants co-manage http://www.qidian.com, a literature website. Sursen alleged that Shanda had abused its dominant position in the online literature market by encouraging two authors to desist from publishing, on Sursen's website, a sequel to an earlier work by a different author, which used the same characters, plot, and setting as the earlier work that had been published on Shanda's website. Sursen asserted that this conduct constituted an abuse of a dominant market position in the online literature market, seeking a court order requiring a public apology from Shanda, as well as compensation for its legal fees.

The Shanghai No. 1 Intermediate People's Court dismissed the case on Oct. 23, 2009, and announced that the evidence adduced did not prove that Shanda had a dominant position in the online literature market, and that Shanda's conduct was justified in protecting its IP rights. The court found that the defendants, Shanda and Xuanting, did not have a dominant position in the "online literature market." The plaintiff had alleged a connection between the defendants' literature website and defendant Shanda's online game business, which allegedly had a dominant position. Specifically, the court held that the plaintiff had not proven a relationship between the defendants' literature website and the Shanda online game business. In essence, the court found that Sursen had failed to define a proper relevant market. The court went on to find that, although Shanda's website and third-party websites stated that Shanda's had more than 80 percent of the Chinese online literature market, this evidence did not constitute proof of market share. Instead, these statements were found to be made solely for the purpose of promoting the websites. The court also found that the plaintiff's own website declared that it had the biggest electronic publications website, but, by the same reasoning, that statement did not establish that the plaintiff had a dominant position. In sum, the court concluded that Sursen had not proven that the defendants had a dominant market position in a properly defined relevant market. In addition to the failure to define a relevant market, the court's finding on a lack of proof of a dominant market position may have been based on the absence of evidence that the defendants' collective market share was not proven to exceed the thresholds in Article 19, as the court did not address any of the specific factors for determining dominance under Article 18.

As an alternative basis for the court's decision, the court concluded that the defendants' conduct was justified to prevent the plaintiff from misleading the public, as the similarities between the pseudonym and story adopted by the plaintiff and those of the defendants suggested that the unauthorized sequel was written by the same authors. The court ruled that a precondition for finding an abuse of dominance is the absence of a valid justification for the conduct. Presumably, this finding is limited to those abuses, under

Article 17, that require that the abuse be without justification.[111] Under the facts of the case, the court held, it was reasonable for the defendants to order the writers to stop.

Another abuse of dominance court decision was in a case filed by Tangshan Renren Information Service Company (TRISC) against Baidu, Inc. (Baidu).[112] TRISC operates an online information platform that brokers deals between pharmaceutical companies and distributors and companies. Baidu, Inc. operates the leading Chinese online search engine, http://www.baidu.com. TRISC filed suit in the Beijing No. 1 Intermediate People's Court, alleging that Baidu had abused its dominant position in the Chinese search engine market by artificially lowering Baidu search results for TRISC in order to coerce TRISC to continue to purchase advertising through Baidu's bid-ranking service. Specifically, TRISC claimed that Baidu's conduct sought to force TRISC to deal exclusively with Baidu without any justification, in violation of Article 17(4). TRISC alleged that Baidu's conduct had caused TRISC to lose online traffic and consequently to lose substantial revenues. TRISC sought an injunction prohibiting Baidu from continuing this conduct, and for an award of damages of approximately $163,000 in lost revenues. Baidu replied that its downgrading of TRISC in search results was a legitimate action under its listing policies, because TRISC had allegedly set up an online "bot" to automatically post junk posts on various websites and sent out span messages (so-called "junk links") to artificially boost TRISC's ranking in Baidu search results.

The court found that the relevant market for the determination of whether Baidu had a dominant market position was the search engine market in China. This is a notable decision, in that the court referred in its decision to the AMC Guidelines on the Definition of Relevant Markets, indicating that courts may take into consideration the various anti-monopoly guidelines, rules, and regulations promulgated by the AMC or AMEAs, which may help make AML court decisions more consistent with those of the AMEAs. The court relied primarily on consideration of demand substitutes in arriving at its decision that the relevant market was the Chinese "search engine service market." Baidu argued that the search service provided by Baidu is a free, nonprofit service and is therefore not covered by the AML and could not

111. In this instance, the specifically defined abuse that would appear most relevant to Sursen's claims is "limiting relative trading parties to conduct deals exclusively with them or designated parties without any justification." AML, art. 17(4). Some other specific abuses under Article 17 do not require the absence of justification, such as sales at unfairly high or low prices in violation of Article 17(1).

112. *See* The First Case in Anti-Monopoly: Tangshan Renren's Claim against Baidu was Dismissed, http://www.chinanews.com.cn, Dec. 19, 2008, *available in Chinese at* http://www.chinanews.com.cn/cj/cj-gncj/news/2009/12-19/2027117.shtml (last visited Mar. 16, 2011). For a transcript of the hearing in the *Baidu* case, in Chinese, see http://www.chinacourt.org/zhibo/zhibo.php?zhibo_id=1865 (last visited Mar. 16, 2011).

constitute a relevant product market under the AML. The court rejected this argument, reasoning that Baidu derived advertising and other revenues through its search service, even though users may use the search function free of charge. The court based its decision to limit the relevant geographic market to China on its finding that service providers located in China are closer competitors than are others, because of differences in culture, language, and habits of Chinese users.

After trial on the merits, the court rendered its substantive decision in favor of Baidu. First, the court found that the evidence presented by TRISC was insufficient to prove that Baidu was dominant in the relevant market. On this issue, TRISC has submitted only a few statements from various media sources regarding Baidu's market share. The court found that these sources did not provide a sufficiently scientific and objective basis for proving Baidu's dominant market share, as the sources did not include any explanation of the methods used for calculating the market share. The court also found that Baidu's alleged conduct was justified because TRISC had admitted that it had engaged in the practice of creating junk lists, and Baidu had posted its policy prohibiting such lists on its website. The court accepted Baidu's assertion that it applied this policy to all websites, though Baidu offered no proof that it had actually punished other sites that had created junk lists. The court found that the policy was designed to ensure the accuracy and integrity of the search results for the benefit of users, and thus concluded that, even assuming Baidu had a dominant market position, its conduct was justified and therefore did not violate Article 17(4). The court found that TRISC did not prove that its reduction in advertising spending and Baidu's subsequent conduct caused the alleged decrease in visits to TRISC's website. The *Baidu* court also appeared to require proof of anticompetitive effects, or "an injury on the competition order," as a prerequisite to a finding of an abuse of dominance. Article 17, which contains the statutorily defined abuses of a dominant market position, does not expressly include any requirement of anticompetitive effects. Article 6, however, in the AML General Provisions, provides a general prohibition of abuses of a dominant market position that "eliminate or restrict competition." Though this language falls outside Chapter 3, which is devoted to abuses of a dominant market position, it provides a basis on which other courts, and possibly the AMEAs, may require proof of an adverse effect on competition as a necessary element for any finding of an abuse of a dominant market position. This decision appears to support the conclusion, discussed above, that the effects on competition described in Article 6 should be construed as being incorporated as a substantive element of abuses of a dominant position described in Article 17.

The similarities of the courts' handling of the *Netcom*, *Shanda*, and *Baidu* decisions are striking. All three courts appeared to require a high level of proof of dominance, rejecting summary arguments and third-party sources that failed to provide an objective basis for their market share calculations.

Both the *Shanda* and *Baidu* judgments reiterated that the AML does not prohibit the possession of a dominant market position, standing alone, but only conduct that constitutes an abuse of a dominant market position. In light of the difficulty of obtaining reliable information on market shares in China, requiring AML plaintiffs to carry such a high evidentiary burden on this issue may prove a substantial impediment to future plaintiffs' succeeding in many abuse of dominance cases. All three courts were also open to accepting defendants' assertions of legitimate justifications for their allegedly anticompetitive conduct. The courts' apparent acceptance of defendants' justifications at face value contrasts with the more rigorous proof on market share demanded of plaintiffs.

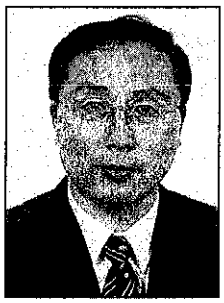
Though the few decisions to date provide too little history for any definitive conclusions, it appears that courts will require solid evidence on each element of an abuse of dominance case. This may presage increased use of economic and industry experts to provide evidence on such issues as effects on competition, damages, market definition, and the existence, *vel non*, of a dominant market position.

Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China

Editors' Note: *This is the third interview with Director General Shang by* The Antitrust Source.* *We once again follow up with DG Shang regarding the recent developments in China's merger review process and MOFCOM's plans for the future. We thank DG Shang for sharing his views with us, and SUN Miao and other officials from MOFCOM for facilitating this interview.*

This interview was conducted in writing for The Antitrust Source *by Fei Deng and Yizhe Zhang on March 7, 2014.*

THE ANTITRUST SOURCE: MOFCOM recently issued the *Interim Rules of the Criteria for Simple Cases of Concentrations of Undertakings*.[1] Compared to the review of the regular case, how does the review of a simple concentration differ with respect to the review time, procedure, and the information the parties are required to provide?



DIRECTOR GENERAL SHANG MING: On February 11, 2014, MOFCOM issued an announcement regarding the implementation of *Interim Rules on the Criteria for Simple Cases of Concentrations of Undertakings* (Criteria Rules on Simple Cases). The Criteria Rules on Simple Cases lay out clear quantitative and qualitative criteria under which a case will qualify as a simple case as well as exceptional circumstances under which the criteria will not apply.[2] Right now, we are working on the relevant procedural rules for such cases, including how to apply for simple case status, the materials to be provided, the review procedures and time frames, etc. We will issue these procedural rules when appropriate.

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* *Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Minstry of Commerce of the People's Republic of China*, ANTITRUST SOURCE, Feb. 2009, http://www.abanet.org/antitrust/at-source/09/02/Feb09-Shangintrvw2-26f.pdf; *Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Minstry of Commerce of the People's Republic of China*, ANTITRUST SOURCE, Feb. 2011, http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_shangintrvw2_23f.authcheckdam.pdf.

[1] *See* http://fldj.mofcom.gov.cn/article/ztxx/201402/20140200487001.shtml (in Chinese).

[2] *Id.*; *see also* http://www.jonesday.com/antitrust-alert--china-moves-towards-an-expedited-review-for-mergers-but-leaves-details-unclear-02-24-2014/. The Rules specify the following criteria under which a concentration would be treated as a "simple" case: (1) a horizontal merger where the combined share of all parties is less than 15% in each relevant market; (2) a vertical merger where the parties' market shares do not exceed 25% in either the upstream or downstream market; (3) a conglomerate merger where the market share of each party in each market involved does not exceed 25%; (4) a joint venture established outside of China that has no activities in China; or (5) an acquisition of a foreign company that has no activities in China. The Rules provide that a case will not be treated as "simple" if (1) the concentration involves a joint venture previously controlled by two or more parties that post-concentration will be controlled by one of the parties and the joint venture competes with the controlling party in the same relevant market; (2) the relevant markets are difficult to define; or (3) MOFCOM believes that the concentration may result in adverse effects to market entry, technology development, consumers, other undertakings or the national economy. The Rules also provide that MOFCOM will revoke the "simple" case status if it finds out that the notifying party concealed material information or provided false or misleading information, if third parties provide evidence showing the existence of competitive concerns, or if significant changes occur with respect to the concentration or in the relevant markets.

ANTITRUST SOURCE: Recently, the information disclosed by MOFCOM's conditional approval announcements of concentrations has been more comprehensive and, as exemplified by the announcement regarding the acquisition of Life Technologies by Thermo Fisher Scientific, has included the results of economic analysis. Does this reflect that MOFCOM is utilizing more applied economic analysis tools in its reviews?

DG SHANG MING: The importance of economic analysis in the review of concentrations has been widely recognized. The application of economic theories and models not only provides the Bureau with new tools to obtain evidence, but also enhances the scientific credibility of the review. MOFCOM has always highly valued the application of economic theories and analytical methods and has built a specialized economist team. MOFCOM will selectively apply economic analysis tools in the review process based on the actual circumstances. For those significant and complicated cases, MOFCOM may also engage outside economists to facilitate the analysis when necessary.

ANTITRUST SOURCE: The *Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings (Draft for Public Comment)* were published for comment in March 2013. When do you expect to issue the final Provisions? Could you give us some insight on what factors MOFCOM will take into account when making decisions to impose restrictive conditions and how these factors are considered? How does MOFCOM evaluate the efficiency defenses that the notifying parties make?

DG SHANG MING: In March 2013, *Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings* (Provisions) were released on MOFCOM's website, soliciting public comment. We reviewed and compiled a large number of opinions and suggestions provided by the public during the process, and further revised the draft. Currently, the main body of the Provisions has been finalized, and the Provisions are under MOFCOM's internal legislative procedure. We are aiming to issue the final Provisions within this year.

Regarding the factors considered and practices adopted when deciding whether to impose restrictive conditions, MOFCOM will notify and explain to the notifying parties within a reasonable period of time, should MOFCOM, during the review process, find any adverse impact the concentration may have on competition. Within the prescribed period of time, the notifying parties then shall submit proposals on restrictive conditions that would be sufficient to eliminate the adverse effect on competition. Of course, the parties are welcome to voluntarily submit proposals on restrictive conditions before MOFCOM raises any concerns. If the notifying parties have proposed restrictive conditions within the prescribed time period, MOFCOM will discuss them with the parties, evaluate the effectiveness, feasibility and timeliness of the proposals, and inform the parties of the evaluation results. If the parties have not proposed restrictive conditions, or if the proposed restrictive conditions fail to sufficiently mitigate the adverse effect on competition, then MOFCOM will prohibit the transaction.

In considering relevant factors, MOFCOM focuses on whether the restrictive conditions to be imposed can mitigate the adverse effect on competition. The factors considered may come from various perspectives, including efficiency, whether a bankrupt company is involved, the balance of the public interest, etc.

ANTITRUST SOURCE: It would appear from the published decisions that MOFCOM is more inclined to impose behavioral remedies rather than structural remedies in horizontal merger cases. Do you agree with this conclusion?

DG SHANG MING: MOFCOM has no general preferences over the type of remedy, but rather we determine the type of remedy according to the specific nature of each case and the necessity of addressing competition issues. There are plenty of examples where the remedies imposed by MOFCOM are purely structural, or a combination of structural and behavioral. In order to decide the remedies to impose, the primary consideration is the specific circumstances of the case, including the extent to which the transaction negatively impacts competition, the appropriateness and the feasibility of the remedies, as well as the difficulty in monitoring the implementation of such remedies. It is not appropriate to conclude that MOFCOM has a general preference for a particular type of remedy based only on a few individual cases.

ANTITRUST SOURCE: One of the major disadvantages of behavioral remedies is that continuous monitoring may require substantial human resources and costs. Given MOFCOM's limited staffing, how can MOFCOM ensure effective monitoring of behavioral remedy implementations?

DG SHANG MING: Compared with structural measures, monitoring of behavioral remedies is more difficult and more resource-consuming for regulatory authorities. As for the monitoring of a hold-separate commitment, we require the parties to engage a monitoring trustee to be responsible for monitoring the remedy implementation. On one hand, we require the monitoring trustee to fulfill their duties and to do their job with due diligence. On the other hand, we may require the parties to submit implementation reports on a regular or ad hoc basis.

ANTITRUST SOURCE: In practice, how does MOFCOM supervise the trustee to ensure that it does not abuse its mandate by expanding the scope of its duties?

DG SHANG MING: MOFCOM will require the notifying parties to propose several trustee candidates and will evaluate them. An important consideration is whether the monitoring plan the trustee proposes is clear and feasible. When the monitoring trustee is appointed, MOFCOM will further evaluate the monitoring plan and set clear boundaries on the rights and obligations of the appointed monitoring trustee. The notifying parties must provide the monitoring trustee with all necessary support. The notifying parties may report to MOFCOM if they disagree with the monitoring trustee's conduct.

ANTITRUST SOURCE: What new rules or guidelines does MOFCOM plan to promulgate in the near future? Also, as indicated by some media outlets, the National People's Congress (NPC) is contemplating amending the Antimonopoly Law. What role will MOFCOM have in this process?

DG SHANG MING: In 2014, MOFCOM will focus its work on issuing the abovementioned *Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings* and guidance for the notification of simple cases. In the meantime, based on experience gained over the past five years, MOFCOM is considering amending the *Notification Measures of the Concentration of Undertakings* and the *Review Measures of the Concentration of Undertakings*.

With regard to the amendment of the Antimonopoly Law, the provisions of the Antimonopoly Law are general in nature. Over the past five years of enforcement, MOFCOM has promulgated a series of supplementary rules to make the law more enforceable. However, for some important issues such as the definition of control, as an enforcement agency we have no power to interpret them; they are subject to authoritative interpretation by the upper legislative bodies. Therefore, it

is a primary task in the mid- and long-term to amend the Antimonopoly Law so as to provide a clearer basis for its enforcement. MOFCOM will actively cooperate with the legislative bodies to facilitate this process.

ANTITRUST SOURCE: MOFCOM has recently issued warnings and fines where merging parties failed to notify a concentration with MOFCOM. Could you offer some more details about these cases and how MOFCOM learned about these suspected notification failures?

DG SHANG MING: The information of suspected unnotified cases mainly comes from two sources: one is third-party whistle-blowing, and the other is clues MOFCOM discovers during its reviews of other concentrations.

With regard to suspected unnotified cases, during the investigation MOFCOM will take into account the nature, extent, and duration of the failure to notify, as well as whether the concentration has or may have the effect of eliminating or restricting competition. Where, after investigation, the concentration is verified to be a concentration that was not duly notified, MOFCOM may impose a fine of up to RMB500,000 on the undertakings and can additionally require the investigated parties to take measures to restore competition to the state that existed before the concentration. Depending on the specific circumstances, such measures may include terminating implementation of the concentration, disposing the parties' shares or assets within a specified time limit, selling their businesses within a specified time limit, and other necessary measures.

Up to now, MOFCOM has investigated and punished 11 unnotified cases, and the main penalties imposed have been warnings and fines.

ANTITRUST SOURCE: Over the past five years, MOFCOM has made a number of efforts to increase the transparency of its enforcement work, including the timely release of the announcements regarding conditional approvals and prohibitions, as well as the quarterly release of the statistics for unconditional approvals. What other measures will MOFCOM take to further increase its enforcement transparency?

DG SHANG MING: MOFCOM has always paid great attention to the transparency of its antimonopoly enforcement. At the enforcement level, in addition to the disclosure of cases prohibited and conditionally approved in accordance with the law, it can be observed that, over the past five years, the content of the published decision has been transformed from simple to comprehensive, with an increasing amount of information provided over time. Since October 2013, MOFCOM has started to disclose basic information on all unconditionally approved cases. These data are currently disclosed on a quarterly basis. At the legislative level, over the last five years, MOFCOM has promulgated a series of supplementary rules to provide clear guidance to the notifying parties and to increase the transparency of enforcement. In the future, MOFCOM will continue to issue relevant rules and further steadily increase the transparency of enforcement.

ANTITRUST SOURCE: Looking back over the past five years since MOFCOM's formation, what have you learned, what might you have done differently, and what are your future goals for the Bureau?

DG SHANG MING: As a witness to the entire process from the drafting to the enforcement of the Antimonopoly Law, I am delighted to see that MOFCOM has made positive progress on many aspects since the promulgation of the Antimonopoly Law five years ago. Personally, I think our

greatest achievement is that competition policy and the notion of competition has stepped up from unheard-of to front-and-center in the everyday life of Chinese society, and its important role in economic development has been widely recognized. In some of the significant government documents recently released, terms such as "fair competition" and "antimonopoly" were repeatedly mentioned, which is significant historical progress. Moreover, as individuals and as a team, we who make competition policies and enforce the law have grown rapidly. In respect of antitrust review of concentrations, China has become one of the most important jurisdictions in the world in a short time. Specifically, over the past five years we have made positive progress in the following aspects:

(1) We have built a professional enforcement team. We have established a scientific work process and trained a young and professional enforcement team through the adoption of internal rules, training and building of talent and capabilities, and gradual improvement in the structure of our internal organization.

(2) We have gradually improved the legal system regarding merger review. In the past five years, on average we issued two sets of supplementary rules per year and have established a multilayer system of rules, consisting of, from top to bottom, State Council regulations, AMC guidelines, MOFCOM ministerial rules, and guidance of the Antimonopoly Bureau of MOFCOM.

(3) We have duly carried out our enforcement work. From 2008 to the end of February 2014, MOFCOM has completed the review of 775 concentrations, among which 753 cases were unconditionally approved, 21 were conditionally approved, and 1 was prohibited. Through enforcement work, we have maintained the effectiveness of market competition and protected consumer welfare.

(4) We have promoted competition culture. MOFCOM has organized and carried out many kinds of competition training activities to enhance the legal awareness of antimonopoly law among various levels of government authorities, enterprises, and the general public, and has fostered the formation of the Chinese competition culture.

(5) We have engaged in full international cooperation. MOFCOM has established cooperation mechanisms with the competition enforcement agencies in major jurisdictions and has also established good cooperative relationships with international organizations such as OECD, APEC, and UNCTAD.

Of course, we are fully aware that we only have several years of enforcement experience, and there is still a lot to be further improved. The new administration of the Chinese government has offered a grand blueprint for China's future reform. I believe that the Antimonopoly Law will play an increasingly important role in China's in-depth reform and the wider opening-up. Specifically, MOFCOM's future work priorities include:

(1) To continue issuing supplementary rules. MOFCOM will keep summarizing the accumulated enforcement experience and will continue to promulgate supplementary rules to meet the needs of enforcement.

(2) To enhance law enforcement. MOFCOM will summarize the experience accumulated in concentration reviews, further enhance the review quality and efficiency, more strictly investigate and punish unnotified cases, and strengthen the awareness of the need for compliance in the whole society through strict enforcement of the law.

(3) To promote a culture of competition. The enforcement of the Antimonopoly Law requires support, understanding, and cooperation from all sectors of the society, and requires a good legal environment, where not only the enforcement agencies are required to responsibly perform their duties, but also undertakings are required to voluntarily abide by the law. MOFCOM will actively promote a culture of competition through its enforcement, innovated training activities, etc.

(4) To further deepen international cooperation. MOFCOM will continue to deepen the cooperation with the antimonopoly authorities in other major jurisdictions, further enhance case cooperation, and continue to contribute to maintaining the structure of market competition around the world. ●

DAY 9, THURSDAY, JULY 10, 2014

1. Cases
    1. *U.S. v. Microsoft*
    2. *Tencent QQ v. Qihoo 360*

UNITED STATES v. MICROSOFT CORP.

United States Court of Appeals for the District of Columbia Circuit, 2001.
253 F.3d 34.

Before: EDWARDS, Chief Judge, WILLIAMS, GINSBURG, SENTELLE, RANDOLPH, ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed PER CURIAM.

* * *

II. MONOPOLIZATION

* * *

A. Monopoly Power

While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge. The Supreme Court defines monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.1995); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447,

460–61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (using direct proof to show market power in Sherman Act § 1 unreasonable restraint of trade action). Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. "Entry barriers" are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.

The District Court considered these structural factors and concluded that Microsoft possesses monopoly power in a relevant market. Defining the market as Intel-compatible PC operating systems, the District Court found that Microsoft has a greater than 95% share. It also found the company's market position protected by a substantial entry barrier.

Microsoft argues that the District Court incorrectly defined the relevant market. It also claims that there is no barrier to entry in that market. Alternatively, Microsoft argues that because the software industry is uniquely dynamic, direct proof, rather than circumstantial evidence, more appropriately indicates whether it possesses monopoly power. Rejecting each argument, we uphold the District Court's finding of monopoly power in its entirety.

1. Market Structure

a. Market definition

"Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level," *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C.Cir.1986), the relevant market must include all products "reasonably interchangeable by consumers for the same purposes." In this case, the District Court defined the market as "the licensing of all Intel-compatible PC operating systems worldwide," finding that there are "currently no products—and . . . there are not likely to be any in the near future—that a significant percentage of computer users worldwide could substitute for [these operating systems] without incurring substantial costs." Calling this market definition "far too narrow," Microsoft argues that the District Court improperly excluded three types of products: non-Intel compatible operating systems (primarily Apple's Macintosh operating system, Mac OS), operating systems for non-PC devices (such as handheld computers and portal websites), and "middleware" products, which are not operating systems at all.

We begin with Mac OS. Microsoft's argument that Mac OS should have been included in the relevant market suffers from a flaw that infects many of the company's monopoly power claims: the company fails to challenge the District Court's factual findings, or to argue that these findings do not support the court's conclusions. The District Court found that consumers would not switch from Windows to Mac OS in response to a substantial price increase because of the costs of acquiring the new hardware needed to run Mac OS (an Apple computer and peripherals) and compatible software applications, as well as because of the effort involved in learning the new system and transferring files to its format. The court also found the Apple system less appealing to consumers because it costs considerably more and supports fewer applications. Microsoft responds only by saying: "the district court's market

definition is so narrow that it excludes Apple's Mac OS, which has competed with Windows for years, simply because the Mac OS runs on a different microprocessor." This general, conclusory statement falls far short of what is required to challenge findings as clearly erroneous. Microsoft neither points to evidence contradicting the District Court's findings nor alleges that supporting record evidence is insufficient. And since Microsoft does not argue that even if we accept these findings, they do not support the District Court's conclusion, we have no basis for upsetting the court's decision to exclude Mac OS from the relevant market.

Microsoft's challenge to the District Court's exclusion of non-PC based competitors, such as information appliances (handheld devices, etc.) and portal websites that host serverbased software applications, suffers from the same defect: the company fails to challenge the District Court's key factual findings. In particular, the District Court found that because information appliances fall far short of performing all of the functions of a PC, most consumers will buy them only as a supplement to their PCs. The District Court also found that portal websites do not presently host enough applications to induce consumers to switch, nor are they likely to do so in the near future. Again, because Microsoft does not argue that the District Court's findings do not support its conclusion that information appliances and portal websites are outside the relevant market, we adhere to that conclusion.

This brings us to Microsoft's main challenge to the District Court's market definition: the exclusion of middleware. * * *

Operating systems perform many functions, including allocating computer memory and controlling peripherals such as printers and keyboards. Operating systems also function as platforms for software applications. They do this by "exposing"—*i.e.*, making available to software developers—routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or "APIs." * * * Software developers wishing to include [any] function in an application need not duplicate it in their own code. Instead, they can "call"—*i.e.*, use—the Windows API. Windows contains thousands of APIs, controlling everything from data storage to font display.

Every operating system has different APIs. Accordingly, a developer who writes an application for one operating system and wishes to sell the application to users of another must modify, or "port," the application to the second operating system. This process is both time-consuming and expensive.

"Middleware" refers to software products that expose their own APIs. Because of this, a middleware product written for Windows could take over some or all of Windows's valuable platform functions—that is, developers might begin to rely upon APIs exposed by the middleware for basic routines rather than relying upon the API set included in Windows. If middleware were written for multiple operating systems, its impact could be even greater. The more developers could rely upon APIs exposed by such middleware, the less expensive porting to different operating systems would be. Ultimately, if developers could write applications relying exclusively on APIs exposed by middleware, their applications would run on any operating system on which the middleware was also present. Netscape Navigator and Java–both at issue in this case—are middleware products written for multiple operating systems.

Microsoft argues that, because middleware could usurp the operating system's platform function and might eventually take over other operating system functions (for instance, by controlling peripherals), the District Court erred in excluding Navigator and Java from the relevant market. The District Court found, however, that neither Navigator, Java, nor any other middleware product could now, or would soon, expose enough APIs to serve as a platform for popular applications, much less take over all operating system functions. Again, Microsoft fails to challenge these findings, instead simply asserting middleware's "potential" as a competitor. The test of reasonable interchangeability, however, required the District Court to consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function. Whatever middleware's ultimate potential, the District Court found that consumers could not now abandon their operating systems and switch to middleware in response to a sustained price for Windows above the competitive level. Nor is middleware likely to overtake the operating system as the primary platform for software development any time in the near future.

Alternatively, Microsoft argues that the District Court should not have excluded middleware from the relevant market because the primary focus of the plaintiffs' § 2 charge is on Microsoft's attempts to suppress middleware's threat to its operating system monopoly. According to Microsoft, it is "contradict[ory]," to define the relevant market to exclude the "very competitive threats that gave rise" to the action. The purported contradiction lies between plaintiffs' § 2 theory, under which Microsoft preserved its monopoly against middleware technologies that threatened to become viable substitutes for Windows, and its theory of the relevant market, under which middleware is not presently a viable substitute for Windows. Because middleware's threat is only nascent, however, no contradiction exists. Nothing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes. Because market definition is meant to identify products "reasonably interchangeable by consumers," and because middleware is not now interchangeable with Windows, the District Court had good reason for excluding middleware from the relevant market.

b. Market power

Having thus properly defined the relevant market, the District Court found that Windows accounts for a greater than 95% share. The court also found that even if Mac OS were included, Microsoft's share would exceed 80%. Microsoft challenges neither finding, nor does it argue that such a market share is not predominant.

Instead, Microsoft claims that even a predominant market share does not by itself indicate monopoly power. Although the "existence of [monopoly] power ordinarily may be inferred from the predominant share of the market," *Grinnell*, 384 U.S. at 571, we agree with Microsoft that because of the possibility of competition from new entrants, looking to current market share alone can be "misleading." In this case, however, the District Court was not misled. Considering the possibility of new rivals, the court focused not only on Microsoft's present market share, but also on the structural barrier that protects the company's future position. That barrier—the "applications barri-

er to entry"—stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.

Challenging the existence of the applications barrier to entry, Microsoft observes that software developers do write applications for other operating systems, pointing out that at its peak IBM's OS/2 supported approximately 2,500 applications. This misses the point. That some developers write applications for other operating systems is not at all inconsistent with the finding that the applications barrier to entry discourages many from writing for these less popular platforms. Indeed, the District Court found that IBM's difficulty in attracting a larger number of software developers to write for its platform seriously impeded OS/2's success.

Microsoft does not dispute that Windows supports many more applications than any other operating system. It argues instead that "[i]t defies common sense" to suggest that an operating system must support as many applications as Windows does (more than 70,000, according to the District Court) to be competitive. Consumers, Microsoft points out, can only use a very small percentage of these applications. As the District Court explained, however, the applications barrier to entry gives consumers reason to prefer the dominant operating system even if they have no need to use all applications written for it:

> The consumer wants an operating system that runs not only types of applications that he knows he will want to use, but also those types in which he might develop an interest later. Also, the consumer knows that if he chooses an operating system with enough demand to support multiple applications in each product category, he will be less likely to find himself straitened later by having to use an application whose features disappoint him. Finally, the average user knows that, generally speaking, applications improve through successive versions. He thus wants an operating system for which successive generations of his favorite applications will be released—promptly at that. The fact that a vastly larger number of applications are written for Windows than for other PC operating systems attracts consumers to Windows, because it reassures them that their interests will be met as long as they use Microsoft's product.

Findings of Fact ¶ 37. Thus, despite the limited success of its rivals, Microsoft benefits from the applications barrier to entry.

* * *

Microsoft next argues that the applications barrier to entry is not an entry barrier at all, but a reflection of Windows' popularity. It is certainly true that Windows may have gained its initial dominance in the operating system market competitively—through superior foresight or quality. But this case is not about Microsoft's initial acquisition of monopoly power. It is about Microsoft's efforts to maintain this position through means other than compe-

tition on the merits. Because the applications barrier to entry protects a dominant operating system irrespective of quality, it gives Microsoft power to stave off even superior new rivals. The barrier is thus a characteristic of the operating system market, not of Microsoft's popularity, or, as asserted by a Microsoft witness, the company's efficiency. *See* Direct Testimony of Richard Schmalensee ¶ 115.

Finally, Microsoft argues that the District Court should not have considered the applications barrier to entry because it reflects not a cost borne disproportionately by new entrants, but one borne by all participants in the operating system market. According to Microsoft, it had to make major investments to convince software developers to write for its new operating system, and it continues to "evangelize" the Windows platform today. Whether costs borne by all market participants should be considered entry barriers is the subject of much debate. We need not resolve this issue, however, for even under the more narrow definition it is clear that there are barriers. When Microsoft entered the operating system market with MS–DOS and the first version of Windows, it did not confront a dominant rival operating system with as massive an installed base and as vast an existing array of applications as the Windows operating systems have since enjoyed. Moreover, when Microsoft introduced Windows 95 and 98, it was able to bypass the applications barrier to entry that protected the incumbent Windows by including APIs from the earlier version in the new operating systems. This made porting existing Windows applications to the new version of Windows much less costly than porting them to the operating systems of other entrants who could not freely include APIs from the incumbent Windows with their own.

2. Direct Proof

Having sustained the District Court's conclusion that circumstantial evidence proves that Microsoft possesses monopoly power, we turn to Microsoft's alternative argument that it does not behave like a monopolist. Claiming that software competition is uniquely "dynamic," the company suggests a new rule: that monopoly power in the software industry should be proven directly, that is, by examining a company's actual behavior to determine if it reveals the existence of monopoly power. According to Microsoft, not only does no such proof of its power exist, but record evidence demonstrates the absence of monopoly power. The company claims that it invests heavily in research and development, and charges a low price for Windows (a small percentage of the price of an Intel compatible PC system and less than the price of its rivals).

Microsoft's argument fails because, even assuming that the software market is uniquely dynamic in the long term, the District Court correctly applied the structural approach to determine if the company faces competition in the short term. Structural market power analyses are meant to determine whether potential substitutes constrain a firm's ability to raise prices above the competitive level; only threats that are likely to materialize in the relatively near future perform this function to any significant degree. The District Court expressly considered and rejected Microsoft's claims that innovations such as handheld devices and portal websites would soon expand the relevant market beyond Intel-compatible PC operating systems. Because the

company does not challenge these findings, we have no reason to believe that prompt substitutes are available. The structural approach, as applied by the District Court, is thus capable of fulfilling its purpose even in a changing market. Microsoft cites no case, nor are we aware of one, requiring direct evidence to show monopoly power in any market. We decline to adopt such a rule now.

Even if we were to require direct proof, moreover, Microsoft's behavior may well be sufficient to show the existence of monopoly power. Certainly, none of the conduct Microsoft points to—its investment in R & D and the relatively low price of Windows—is inconsistent with the possession of such power. The R & D expenditures Microsoft points to are not simply for Windows, but for its entire company, which most likely does not possess a monopoly for all of its products. Moreover, because innovation can increase an already dominant market share and further delay the emergence of competition, even monopolists have reason to invest in R&D. Microsoft's pricing behavior is similarly equivocal. The company claims only that it never charged the short-term profit-maximizing price for Windows. Faced with conflicting expert testimony, the District Court found that it could not accurately determine what this price would be. In any event, the court found, a price lower than the short-term profit-maximizing price is not inconsistent with possession or improper use of monopoly power. Microsoft never claims that it did not charge the long-term monopoly price. Microsoft does argue that the price of Windows is a fraction of the price of an Intel-compatible PC system and lower than that of rival operating systems, but these facts are not inconsistent with the District Court's finding that Microsoft has monopoly power. *See Findings of Fact* ¶ 36 ("Intel-compatible PC operating systems other than Windows [would not] attract[ ] significant demand ... even if Microsoft held its prices substantially above the competitive level.").

More telling, the District Court found that some aspects of Microsoft's behavior are difficult to explain unless Windows is a monopoly product. For instance, according to the District Court, the company set the price of Windows without considering rivals' prices, something a firm without a monopoly would have been unable to do. The District Court also found that Microsoft's pattern of exclusionary conduct could only be rational "if the firm knew that it possessed monopoly power." It is to that conduct that we now turn.

B. Anticompetitive Conduct

* * *

* * * [A]fter concluding that Microsoft had monopoly power, the District Court held that Microsoft had violated § 2 by engaging in a variety of exclusionary acts to maintain its monopoly by preventing the effective distribution and use of products that might threaten that monopoly. Specifically, the District Court held Microsoft liable for: (1) the way in which it integrated IE ["Internet Explorer" Internet browser, Eds.] into Windows; (2) its various dealings with Original Equipment Manufacturers ("OEMs"), Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple Computer; (3) its efforts to contain and to

subvert Java technologies; and (4) its course of conduct as a whole. Upon appeal, Microsoft argues that it did not engage in any exclusionary conduct.

Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.

From a century of case law on monopolization under § 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. * * *

Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by a private plaintiff, the plaintiff must show that its injury is "of 'the type that the statute was intended to forestall,' "*Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 487–88, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.

Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.

Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the "rule of reason." * * *

Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.

With these principles in mind, we now consider Microsoft's objections to the District Court's holding that Microsoft violated § 2 of the Sherman Act in a variety of ways.

1. Licenses Issued to Original Equipment Manufacturers

The District Court condemned a number of provisions in Microsoft's agreements licensing Windows to OEMs, because it found that Microsoft's imposition of those provisions (like many of Microsoft's other actions at issue in this case) serves to reduce usage share of Netscape's browser and, hence, protect Microsoft's operating system monopoly. The reason market share in

the browser market affects market power in the operating system market is complex, and warrants some explanation.

Browser usage share is important because * * * a browser (or any middleware product, for that matter) must have a critical mass of users in order to attract software developers to write applications relying upon the APIs ["Application Programming Interfaces," Eds.] it exposes, and away from the APIs exposed by Windows. Applications written to a particular browser's APIs, however, would run on any computer with that browser, regardless of the underlying operating system. If a consumer could have access to the applications he desired—regardless of the operating system he uses—simply by installing a particular browser on his computer, then he would no longer feel compelled to select Windows in order to have access to those applications; he could select an operating system other than Windows based solely upon its quality and price. In other words, the market for operating systems would be competitive.

Therefore, Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development. * * *

In evaluating the restrictions in Microsoft's agreements licensing Windows to OEMs, we first consider whether plaintiffs have made out a *prima facie* case by demonstrating that the restrictions have an anticompetitive effect. In the next subsection, we conclude that plaintiffs have met this burden as to all the restrictions. We then consider Microsoft's proffered justifications for the restrictions and, for the most part, hold those justifications insufficient.

a. Anticompetitive effect of the license restrictions

The restrictions Microsoft places upon Original Equipment Manufacturers are of particular importance in determining browser usage share because having an OEM pre-install a browser on a computer is one of the two most cost-effective methods by far of distributing browsing software. The District Court found that the restrictions Microsoft imposed in licensing Windows to OEMs prevented many OEMs from distributing browsers other than IE. In particular, the District Court condemned the license provisions prohibiting the OEMs from: (1) removing any desktop icons, folders, or "Start" menu entries; (2) altering the initial boot sequence; and (3) otherwise altering the appearance of the Windows desktop.

The District Court concluded that the first license restriction—the prohibition upon the removal of desktop icons, folders, and Start menu entries—thwarts the distribution of a rival browser by preventing OEMs from removing visible means of user access to IE. The OEMs cannot practically install a second browser in addition to IE, the court found, in part because "[p]re-installing more than one product in a given category . . . can significantly increase an OEM's support costs, for the redundancy can lead to confusion among novice users." * * *

Microsoft denies the "consumer confusion" story; it observes that some OEMs do install multiple browsers and that executives from two OEMs that do so denied any knowledge of consumers being confused by multiple icons.

Other testimony, however, supports the District Court's finding that fear of such confusion deters many OEMs from pre-installing multiple browsers. Most telling, in presentations to OEMs, Microsoft itself represented that having only one icon in a particular category would be "less confusing for endusers." Accordingly, we reject Microsoft's argument that we should vacate the District Court's Finding of Fact 159 as it relates to consumer confusion.

As noted above, the OEM channel is one of the two primary channels for distribution of browsers. By preventing OEMs from removing visible means of user access to IE, the license restriction prevents many OEMs from pre-installing a rival browser and, therefore, protects Microsoft's monopoly from the competition that middleware might otherwise present. Therefore, we conclude that the license restriction at issue is anticompetitive. * * *

The second license provision at issue prohibits OEMs from modifying the initial boot sequence—the process that occurs the first time a consumer turns on the computer. Prior to the imposition of that restriction, "among the programs that many OEMs inserted into the boot sequence were Internet sign-up procedures that encouraged users to choose from a list of IAPs assembled by the OEM." *Findings of Fact* ¶ 210. Microsoft's prohibition on any alteration of the boot sequence thus prevents OEMs from using that process to promote the services of IAPs, many of which—at least at the time Microsoft imposed the restriction—used Navigator rather than IE in their internet access software. Microsoft does not deny that the prohibition on modifying the boot sequence has the effect of decreasing competition against IE by preventing OEMs from promoting rivals' browsers. Because this prohibition has a substantial effect in protecting Microsoft's market power, and does so through a means other than competition on the merits, it is anticompetitive. * * *

Finally, Microsoft imposes several additional provisions that, like the prohibition on removal of icons, prevent OEMs from making various alterations to the desktop: Microsoft prohibits OEMs from causing any user interface other than the Windows desktop to launch automatically, from adding icons or folders different in size or shape from those supplied by Microsoft, and from using the "Active Desktop" feature to promote third-party brands. These restrictions impose significant costs upon the OEMs; prior to Microsoft's prohibiting the practice, many OEMs would change the appearance of the desktop in ways they found beneficial.

The dissatisfaction of the OEM customers does not, of course, mean the restrictions are anticompetitive. The anticompetitive effect of the license restrictions is, as Microsoft itself recognizes, that OEMs are not able to promote rival browsers, which keeps developers focused upon the APIs in Windows. This kind of promotion is not a zero-sum game; but for the restrictions in their licenses to use Windows, OEMs could promote multiple IAPs and browsers. By preventing the OEMs from doing so, this type of license restriction, like the first two restrictions, is anticompetitive: Microsoft reduced rival browsers' usage share not by improving its own product but,

rather, by preventing OEMs from taking actions that could increase rivals' share of usage.

b. Microsoft's justifications for the license restrictions

Microsoft argues that the license restrictions are legally justified because, in imposing them, Microsoft is simply "exercising its rights as the holder of valid copyrights." Microsoft also argues that the licenses "do not unduly restrict the opportunities of Netscape to distribute Navigator in any event."

Microsoft's primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes * * *. That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: "Intellectual property rights do not confer a privilege to violate the antitrust laws." *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000).

Although Microsoft never overtly retreats from its bold and incorrect position on the law, it also makes two arguments to the effect that it is not exercising its copyright in an unreasonable manner, despite the anticompetitive consequences of the license restrictions discussed above. In the first variation upon its unqualified copyright defense, Microsoft cites two cases indicating that a copyright holder may limit a licensee's ability to engage in significant and deleterious alterations of a copyrighted work. The relevance of those two cases for the present one is limited, however, both because those cases involved substantial alterations of a copyrighted work, and because in neither case was there any claim that the copyright holder was, in asserting its rights, violating the antitrust laws.

The only license restriction Microsoft seriously defends as necessary to prevent a "substantial alteration" of its copyrighted work is the prohibition on OEMs automatically launching a substitute user interface upon completion of the boot process. We agree that a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process. We therefore hold that this particular restriction is not an exclusionary practice that violates § 2 of the Sherman Act.

In a second variation upon its copyright defense, Microsoft argues that the license restrictions merely prevent OEMs from taking actions that would reduce substantially the value of Microsoft's copyrighted work: that is, Microsoft claims each license restriction in question is necessary to prevent OEMs from so altering Windows as to undermine "the principal value of Windows as a stable and consistent platform that supports a broad range of applications and that is familiar to users." Microsoft, however, never substantiates this claim, and, because an OEM's altering the appearance of the desktop or promoting programs in the boot sequence does not affect the code already in the product, the practice does not self-evidently affect either the "stability" or the "consistency" of the platform. * * * Therefore, we conclude Microsoft has not shown that the OEMs' liberality reduces the value of Windows except in the sense that their promotion of rival browsers undermines Microsoft's

monopoly—and that is not a permissible justification for the license restrictions.

Apart from copyright, Microsoft raises one other defense of the OEM license agreements: It argues that, despite the restrictions in the OEM license, Netscape is not completely blocked from distributing its product. That claim is insufficient to shield Microsoft from liability for those restrictions because, although Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones.

* * *

2. Integration of IE and Windows

* * *

Technologically binding IE to Windows, the District Court found, both prevented OEMs from pre-installing other browsers and deterred consumers from using them. In particular, having the IE software code as an irremovable part of Windows meant that pre-installing a second browser would "increase an OEM's product testing costs," because an OEM must test and train its support staff to answer calls related to every software product preinstalled on the machine; moreover, pre-installing a browser in addition to IE would to many OEMs be "a questionable use of the scarce and valuable space on a PC's hard drive."

* * * [The District Court] findings of fact in support of that conclusion center upon three specific actions Microsoft took to weld IE to Windows: excluding IE from the "Add/Remove Programs" utility; designing Windows so as in certain circumstances to override the user's choice of a default browser other than IE; and commingling code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating system.

a. Anticompetitive effect of integration

As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. In a competitive market, firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals; the imposition of liability when a monopolist does the same thing will inevitably deter a certain amount of innovation. This is all the more true in a market, such as this one, in which the product itself is rapidly changing. Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful.

The District Court first condemned as anticompetitive Microsoft's decision to exclude IE from the "Add/Remove Programs" utility in Windows 98. Microsoft had included IE in the Add/Remove Programs utility in Windows 95, but when it modified Windows 95 to produce Windows 98, it took IE out of the Add/Remove Programs utility. This change reduces the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products. Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products

and hence protecting its own operating system monopoly, it is anticompetitive * * *.

Second, the District Court found that Microsoft designed Windows 98 "so that using Navigator on Windows 98 would have unpleasant consequences for users" by, in some circumstances, overriding the user's choice of a browser other than IE as his or her default browser. Plaintiffs argue that this override harms the competitive process by deterring consumers from using a browser other than IE even though they might prefer to do so, thereby reducing rival browsers' usage share and, hence, the ability of rival browsers to draw developer attention away from the APIs exposed by Windows. Microsoft does not deny, of course, that overriding the user's preference prevents some people from using other browsers. Because the override reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive.

Finally, the District Court condemned Microsoft's decision to bind IE to Windows 98 "by placing code specific to Web browsing in the same files as code that provided operating system functions." Putting code supplying browsing functionality into a file with code supplying operating system functionality "ensure[s] that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows...." * * * [P]reventing an OEM from removing IE deters it from installing a second browser because doing so increases the OEM's product testing and support costs; by contrast, had OEMs been able to remove IE, they might have chosen to pre-install Navigator alone.

Microsoft denies, as a factual matter, that it commingled browsing and non-browsing code, and it maintains the District Court's findings to the contrary are clearly erroneous. * * *

* * *

In view of the contradictory testimony in the record, some of which supports the District Court's finding that Microsoft commingled browsing and non-browsing code, we cannot conclude that the finding was clearly erroneous. Accordingly, we reject Microsoft's argument that we should vacate Finding of Fact 159 as it relates to the commingling of code, and we conclude that such commingling has an anticompetitive effect * * *.

b. Microsoft's justifications for integration

Microsoft proffers no justification for two of the three challenged actions that it took in integrating IE into Windows—excluding IE from the Add/Remove Programs utility and commingling browser and operating system code. Although Microsoft does make some general claims regarding the benefits of integrating the browser and the operating system, it neither specifies nor substantiates those claims. Nor does it argue that either excluding IE from the Add/Remove Programs utility or commingling code achieves any integrative benefit. Plaintiffs plainly made out a *prima facie* case of harm to competition in the operating system market by demonstrating that Microsoft's actions increased its browser usage share and thus protected its operating system monopoly from a middleware threat and, for its part, Microsoft failed to meet its burden of showing that its conduct serves a purpose other than protecting its operating system monopoly. Accordingly, we hold that Microsoft's exclusion of IE from the Add/Remove Programs utility and its

commingling of browser and operating system code constitute exclusionary conduct, in violation of § 2.

As for the other challenged act that Microsoft took in integrating IE into Windows—causing Windows to override the user's choice of a default browser in certain circumstances—Microsoft argues that it has "valid technical reasons." Specifically, Microsoft claims that it was necessary to design Windows to override the user's preferences when he or she invokes one of "a few" out "of the nearly 30 means of accessing the Internet." * * * The plaintiff bears the burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it. In the District Court, plaintiffs appear to have done neither, let alone both; in any event, upon appeal, plaintiffs offer no rebuttal whatsoever. Accordingly, Microsoft may not be held liable for this aspect of its product design.

[The court's discussion of the remaining categories of conduct found to be anticompetitive by the district court—agreements with Internet Service Providers, dealings with Internet Access Providers, Internet Content Providers, Independent Software Vendors and Apple Computer, and conduct affecting Sun Microsystems's Java and Intel—were also largely upheld. Eds.]

* * *

C. Causation

As a final parry, Microsoft urges this court to reverse on the monopoly maintenance claim, because plaintiffs never established a causal link between Microsoft's anticompetitive conduct, in particular its foreclosure of Netscape's and Java's distribution channels, and the maintenance of Microsoft's operating system monopoly. This is the flip side of Microsoft's earlier argument that the District Court should have included middleware in the relevant market. According to Microsoft, the District Court cannot simultaneously find that middleware is not a reasonable substitute and that Microsoft's exclusionary conduct contributed to the maintenance of monopoly power in the operating system market. Microsoft claims that the first finding depended on the court's view that middleware does not pose a serious threat to Windows, while the second finding required the court to find that Navigator and Java would have developed into serious enough cross-platform threats to erode the applications barrier to entry. We disagree.

Microsoft points to no case, and we can find none, standing for the proposition that, as to § 2 liability in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct. * * *

* * * To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.

We may infer causation where exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes. Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely *potential* substitutes. But the underlying proof problem is the same—neither plaintiffs nor the court can

confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, "the defendant is made to suffer the uncertain consequences of its own undesirable conduct." 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78.

Given this rather edentulous test for causation, the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue. As to the first, suffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts. As to the second, the District Court made ample findings that both Navigator and Java showed potential as middleware platform threats.

Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, *i.e.*, whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue. As we point out later in this opinion, divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain. Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief. * * *

* * *

The Court finds that, based on the pleadings of the plaintiff and the defendant, the focuses of the dispute in this case are: how to define the relevant market; whether the defendant has a dominant position in the relevant market; whether the defendant has abused a dominant position in order to exclude and restrict competition; and to what degree the defendant should be held responsible for civil liability.

I. REGARDING THE ISSUE OF HOW TO DEFINE THE RELEVANT MARKET

Article 2 of the "Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of Relevant Market" (hereinafter referred to as the "Guidelines") provides that any competitive behavior (including any behavior that has resulted or may result in eliminating or restricting competition) occurs within a particular market scope. The relevant market defines the market scope within which business operators compete against one another. Defining the relevant market in a scientific and reasonable manner plays an important role in key issues such as recognizing competitors and potential competitors, determining the market share of business operators and the degree of market concentration, deciding the market position of business operators, analyzing the impact of business operators' behavior on market competition, judging whether business operators' behavior is illegal, and determining business operators' legal liabilities should they be responsible for any illegal behavior. In the present case, the plaintiff accused the defendant of taking advantage of QQ software and services to restrict competition and promote the bundling of sales, which constitutes an abuse of a dominant position. To determine whether the defendant has a dominant market position, the premise is established from a precise definition of the relevant market of QQ software and services. Article 12 of the PRC Anti-monopoly Law provides that "relevant market" refers to the product scope or territorial scope within which the business operators compete against one another during a certain period of time for specific products or services (hereinafter collectively referred to as "products"). Article 3 of the Guidelines provides that in the practice of anti-monopoly law enforcement, it is usually required to define relevant product market and relevant geographic market. A relevant product market is a market composed of a group or a category of products which are substitutes based on factors such as characteristics, uses and prices of the products, and which mainly refer to products treated by consumers as close substitutes. These products are in comparatively tight competition, and may be treated as a product market where business operators are competing with one another. The relevant geographic market is a geographic area within which consumers can acquire products that have relatively strong substitution relationships. Such geographic areas illustrate a relatively intense competition relationship; therefore it may be treated as the geographic scope within which business operators'

products compete with one another.

A. *The Relevant Product Market*

1. The method adopted for defining the relevant product market in this case

Article 4 of the Guidelines provides that the scope of the relevant market is mainly determined according to the substitution degree of the products (or geographic areas). Those products that have a relatively strong substitution relationship, or those geographic areas in which such products can be provided in the market from the perspective of consumers, constitute the most direct and effective competition constraint on the business operators' behaviors in market competition. Therefore, demand substitution analysis from the consumers' perspective shall be conducted in the relevant market definition. Where supply substitution has similar competition constraint on business operators' behaviors as demand substitution, supply substitution shall be considered in the relevant market definition. Article 5 provides that demand substitution is to determine the degree of substitution among different products from the perspective of consumers according to the products' functions and uses, quality, price acceptance and their availability to the consumer. In principle, from the perspective of consumers, the greater the degree of substitution among products, the fiercer is the competition, and the more likely that the products fall into the same relevant market. Article 10 provides that the hypothetical monopolist test may help resolve the uncertainty that may arise from the relevant market definition. It supposes a profit maximizing business operator (hypothetical monopolist) and the issue to be analyzed is whether the hypothetical monopolist is able bring about a non- transitory (normally one year) increase in the price of the target product on a small scale (normally 5 to 10 per cent) provided that the sales conditions of other products remain the same. If the price increase provokes consumers to switch to close substitute products, rendering the price increase unprofitable, then the substitute products shall be added to the relevant product market and form together with the target product a product group. Then analysis shall be conducted on whether the price increase of the product group would be profitable for the hypothetical monopolist. If the result is affirmative, the new product group constitutes the relevant product market, otherwise the aforesaid analysis process shall continue. The expansion of the product group causes the products inside and outside the group to become increasingly less substitutable. Eventually, a particular product group is formed, in which the hypothetical monopolist can make profit through a price increase. Hence, a relevant product market is defined.

In accordance with the above provisions, the Court determines that the process of defining of a relevant product market in this case may adopt the following methods: to determine the degree of substitutability among different products from the perspective of

consumers based on factors such as the functions and uses of the QQ software and its services that consumers require, as well as quality, price acceptance and availability; meanwhile, the impact of supply substitution should also be taken into consideration.

Regarding whether the analytical method of the hypothetical monopolist test may be adopted, the plaintiffs' expert RBB issued an "Economic Analysis Report on the Anti-monopoly Disputes between Qihoo 360 and Tencent". The report states that all instant messaging product suppliers have decided to set the prices of basic services at zero while also trying to monetize the relationship between the users and the product suppliers; the "hidden" price that users pay may take the form of advertising which pays for the "free" instant messaging products. Whether free instant messaging products can constitute a relevant market depends on whether a hypothetical monopolist which holds all instant messaging products may make profit by lowering product quality or by non-temporarily increasing the "hidden" price of the product on a small scale. The focus of competition among instant messaging products is not price. Thus, the quantitative hypothetical monopolist test is not an effective method to define the relevant product market in this case. Due to the fact that there is a lack of perfect data, it is recommended that a qualitative analysis of the demand substitution between instant messaging products and other communication products should be conducted to assess whether such substitution is sufficient to prevent a hypothetical monopolist from unilaterally reducing the quality of instant messaging products. The Court believes that this case reflects one of the main characteristics of the products and services provided by Internet service providers, i.e., almost all of the suppliers set the price of their basic services at zero. It is true that "free" has become a common, fundamental and viable mode of service for instant messaging services and antivirus security software provided by the defendant and the plaintiff, respectively, as well as for other services such as search engines, microblogging, e-mail, social networking services, news, video and music, etc. The evidence in this case shows that users of instant messaging products and services are highly sensitive to prices. According to the survey of CNNIC, up to 60.6% of users do not want to pay for instant messaging services and 32.7% of users who are willing to pay would only pay for the value-added services on the instant messaging platform, rather than paying for the basic service of instant messaging. A survey of the website eNet shows that if the defendant charges all QQ users it will lead to a loss of 81.71% of its users who will switch to other free instant messaging products and services. In the Microsoft/Skype merger case, evidence shows that if Skype starts to charge users for its service more than 75% of the individual consumers will no longer use the product. Based on this, the European Commission deems that the success of service providers depends to a large extent on the free provision of services. The European Commission believes that if a service provider starts to charge a fee for a service that has been free for a long time and if there are alternative free services on the market then consumers will immediately

start using those free alternative services. When consumers determine the quantity of certain types of instant messaging products, they will take into account the opportunity costs of acquiring such services. However, once suppliers start to charge for such services, consumers' first choice will be to use other free products, even if the opportunity cost of using those free products is higher than that of using the paid products. In other words, compared with the opportunity cost of spending time viewing advertisements, "free of charge" plays a more important role in defining the relevant market. Therefore, when assessing whether the instant messaging products can constitute a relevant market, one should take into account whether a hypothetical monopolist controlling all instant messaging products may make profit by lowering product quality or non-temporarily increasing the "hidden" price of the product on a small scale. However, a more important factor to consider is whether a lot of demand substitution will be generated if a hypothetical monopolist charges the service on a small scale continuously. Accordingly, despite the fact that there is an absence of perfect data, it is still appropriate to consider if the defendant continuously (assuming one year) raises the price from zero to a modest charge and whether there is evidence to support that consumers will switch to other close substitutes in order to determine whether those products should be included in the same relevant product market.

2. Regarding the three types of instant messaging software belonging to the same relevant product market agreed upon by both parties

QQ software is an integrated instant-messaging software, with key features such as text transmission, voice chat, video chat, SMS to mobile phones and offline transfer of files, and asynchronous and offline (non-real-time) communication features, which means that users can receive messages and files of the logged-on users without logging on QQ. Besides the communications services mentioned above, the QQ software also integrates other Internet service functions. The plaintiff's complaint identifies that according to the 2009 "Research Report on Instant Messaging Users in China" by CNNIC, instant messaging software and services can be subdivided into three categories: integrated instant messaging services such as Tencent QQ and Microsoft's MSN; (2) cross-platform instant messaging services, such as Fetion of China Mobile; and cross-network instant messaging services, such as the Skype software services of Tom Group Limited. These three types of products are closely related with each other and can substitute each other in terms of technology and service. The defendant does not object that claim of the plaintiff and the Court confirms that those three types of instant messaging products and services are part of the product group in the same relevant product market.

3. Regarding the substitutability between integrated instant messaging and text, audio and video instant messaging

In this case, text instant messaging refers to a type of real-time SMS service, usually

with the function of detecting the status of other users. Audio instant messaging refers to network voice services transmitted in whole or in part over Internet Protocol networks. Video instant messaging refers to the communication services that allow users to interact with two-way synchronous video and voice transmission from at least two or more places. The "Economic Analysis Report on the Anti-monopoly Disputes between Qihoo 360 and Tencent" by the RBB company suggests that the only difference among the three types of services is the medium of communication, but the common features are online status notice, communication among small groups of users, and real-time and cross-platform interaction. All three services are often available through a single, integrated front-end device. Therefore, it is difficult for products lacking of any of the aforementioned three functions to be considered by most consumers as a good substitute. The three types of products may constitute a separate, overlapping relevant market, and such a market might be a market outside the integrated instant messaging products market because consumers will only replace single-function instant messaging software with integrated-function instant messaging software, rather than the other way around.

The Court finds that, when taking demand substitution into account, consumers can easily and immediately switch among the three services of text, audio and video instant messaging at no cost; from the perspective of supply substitution, most of the service providers are able to provide services of the three functions simultaneously. Therefore, text instant messaging, audio and video messaging should not be distinguished based on the functions, nor be considered as separate communication services. However, they should be considered as part of a broader market; any type of these services does not constitute a separate market, and it is very difficult to divide the instant messaging market into smaller and functionally non- overlapping markets. At the same time, there is evidence in this case showing that consumers are highly sensitive to the price of instant messaging products and services and that they are unwilling to pay any fee for the use of basic services of instant messaging products. If the defendant continuously (assuming one year) raises the price from zero to a modest charge, the Court has reason to believe that consumers may choose instead any kind of service among free text instant messaging, audio or video messaging, so that the defendant makes no profit by doing so. The Plaintiff's expert proposes that consumers will only replace single-function instant messaging software with integrated-function instant messaging software, rather than the opposite. Such a proposition only considers the factors of functional differences, but does not fully consider the status quo that most Internet services are free of charge. So the Court does not adopt this proposition. There is close substitutability between integrated instant messaging and single medium instant messaging as text, audio and video instant messaging. Thus, they belong to product groups of the same relevant product market.

4. Regarding substitutability between QQ and social networking

sites, microblogging service

(1) Regarding functions and purposes, products such as microblog and social networking web sites all provide web-based instant messaging services and separate instant messaging software services. The plaintiff's expert thinks that there is strong competition and demand substitution between web-based instant messaging services and separate instant messaging products provided by microblog and SNS social networking web sites and QQ. Thus, they belong to the same relevant product market to which the defendant has no objection, and the Court adopts this proposition.

(2) When microblog and SNS social networking web sites provide web-based instant messaging products and services, i.e., taking IM products as part of its core products, the issue of whether there is substitutability between QQ and microblog, SNS services is controversial in this case. The plaintiff's expert thinks that the key difference between instant messaging products and social networking websites is that the latter focuses on communication between groups comprised of a large number of users, with fewer requirements for real-time functions, and that the former focuses on real-time communication among a relatively small group of users. Based on the data of weekly effective usage time during the entire period from the first week of 2009 to the last week of 2011, the correlation coefficient of the weekly effective usage time of the two products was 0.098, close to zero. The correlation coefficient of monthly effective usage time is even lower, -0.0248. So the way that social networking software is used in China is different from that of instant messaging software and social networking software may not be an effective substitute. Firstly, the Court finds that there is a lack of data on microblogs in the data used by RBB in making the above conclusions and there is evidence showing that this period of time saw the rise and rapid development of microblogs provided by Sina, Tencent and Sohu. There are reasonable grounds to believe that the rapidly expanding market share of microblogs would exert a great impact on the weekly or monthly effective usage time of social networking web sites, which would ultimately affect the correlation analysis of the social networking web sites and instant messaging products. Secondly, regarding functions and purposes, when one considers instant messaging products as part of microblogs' core products, both microblogs and QQ instant messaging products have the function of instant transmission of information and the diversity of information carrier. Both can offer the function of point-to-point private instant messaging among a small number of groups. Both the micro-groups of microblogs and QQ groups can conduct real-time interaction between two or more people. Instant messaging tool services of social networking websites are used to support its social functions, and both SNS and QQ have social networking attributes. The network of relationships of both SNS and QQ are important means with which to retain users and there is also close substitutability between the two services. In its analysis of the "substitute threats" to instant messaging software, CNNIC points out that after social networking websites, such as renren.com and kaixin001.com, have integrated instant

messaging services and similar video sites, and financial websites have integrated instant messaging services, these products all constitute substitute threats to instant messaging software. Analysis International believes that the microblog of some users has replaced QQ. Zhou Hongyi, CEO of the Plaintiff, thinks that Sina microblog will undermine Tencent. In the case of Microsoft/Skype, the filing party thinks that text, audio and video usually cannot be divided into separate services, but are increasingly viewed as appendages of other activities such as social networking behaviors. The European Commission believes that there is growing consumer demand for a user experience of integrating a range of communication functions. Social networking websites and similar social ecosystems such as Facebook and Google+ explain this trend of providing a broader range of communication services to consumers. Thirdly, taking the price factor into account, there is reason to believe that if the defendant continuously (assuming one year) raises the price from free of charge to a modest charge, it is very likely that consumers will instead choose microblog and SNS social networking services, making the defendant's action of charging fees unprofitable. Fourthly, the plaintiff's expert finds that it is sufficient to define the appropriate relevant market including instant messaging products at the time of the occurrence of "3Q war", which took place in late 2010. However, at that time, there were major distinctions between instant messaging and social networking and microblogs and they did not belong to the same relevant antitrust market. The Court finds that competition is a dynamic process, and when defining a relevant market in an antitrust lawsuit regarding the abuse of a dominant market position, we must consider the status quo and future trends and development of relevant industries. Generally speaking, those acts of abuse of market dominance which are likely to continue for some time should be stopped in order to effectively maintain the market competition mechanism. Strong network technology innovation capabilities and rapid changes of business models are significant features of the Internet industry. Since 2010, microblogs and social networking sites have demonstrated a high degree of integration with instant messaging in a relatively short period. Therefore, when identifying the relevant market it will not lead to a scientific, rational and effective suppression of abuse of dominance if one only considers a relatively short period of disputes between the two parties that occurred in 2010. The Court does not accept testimony of the plaintiff's expert. In summary, QQ, social networking websites and microblogging services belong to product groups of the same relevant market.

5. Regarding the substitutability between traditional telephone, fax and instant messaging products and services

The defendant suggests that there is a relatively high degree of substitutability between instant messaging services and traditional means of communication, such as telephone and fax. Thus they should be included in product groups of the same relevant market. The plaintiff believes that instant messaging is a completely Internet-based service and is significantly different from traditional non-network services, and thus

they do not belong to the same relevant product market. The Court finds that QQ products and services is essentially still a communication service and there is some competition between QQ and traditional communications services such as telephone, cell phone, and text messages. However, compared with traditional communications services such as telephone, cell phone, and text messages, QQ is technically quite different. What's more, landline, mobile phone and SMS are all fee-based services, while instant messaging is a free service. So there is no close substitutability between QQ and such traditional means of communication as SMS, mobile communication and landline, and there is no substitution relationship between them.

6. Regarding whether QQ software and e-mail belong to product groups of the same relevant product market

The defendant believes that there are strong competitive and substitution relationships between e-mail products and instant messaging services. The Court finds that although the core function of e-mail products is network communication, they also have text, images, audio, and video file transfer capabilities, which are not instant communication products. Although most of the E-mail service providers have developed instant messaging functions, such as chat with friends and embedded such functions in the e-mail interface, there is still a huge difference between such functions and instant messaging software in terms of voice communications, video communications, plug-in games, screenshots and the convenience of operation of the tools. A friends-chat feature is only a supplement to the communication function of e-mail, and its actual usage is not frequent. It is generally difficult for users to switch directly between those two services and there is only a weak relationship of substitution between e-mail and such instant messaging products as QQ. Because of the sharp differences in functions and purposes, even if QQ started to charge small fees for a long period, it would be difficult for consumers to choose to use e-mail. Therefore, e-mail and QQ do not belong to the same relevant product market.

7. Regarding whether to define the relevant market as Internet application platforms

The defendant's experts propose that QQ software is an integrated platform product, which provides value-added services and advertising services in addition to instant messaging services. Operators of Internet application platforms include the plaintiff (Internet safety platform), the defendant (instant messaging platform), and other Internet companies in the industry, such as Baidu (search platform), Sina (news portal platform and microblogging platform). So the relevant market in this case is much larger than the market for instant messaging software and services. The Court finds that, firstly, the Internet application platform as a business model is becoming more and more common. Consequently, users, traffic, and usage time become the main focus of competition on the

Internet. QQ has the functions of an integrated services platform, providing services such as advertising, information, dating, and microblogging in addition to the instant messaging service. All those services can be integrated and cross-used. MSN is a platform that integrates a series of Internet application services, such as instant messaging features, Bing search, translation, E-mail, online shopping, and games. Aliwangwang and Fetion also integrate various Internet applications, including instant messaging. The survey of CNNIC shows that more than 50.2% of users will log on to use other services through the instant messaging service software. Similarly, after having a large number of users through the core product, microblog, Sina Microblog starts to provide various applications such as instant messaging, advertising, games, micro-music, and microdata on the platform of microblogs. 360 Browser also provides translation, games, e-mail, and many other services to its browser users. In addition to providing social networking services, Renren.com also provides instant messaging, advertising and other services. Obviously, all those companies provide free services to attract a large number of users and then take advantage of the huge user resources in the operation of value-added services and advertising to make profit. In turn, they use the profit generated from value-added services and advertising to support the survival and development of their free services. This has become the typical business model in the Internet industry. In this business model, the real competition among service providers is about the number of users, page views and effective usage time. The reason is that more users generate greater traffic and more effective usage time, which lead to higher profits from advertising and value-added services. Vise-versa, those companies can survive and grow their business only by providing an integrated platform to attract more users and increase their effective usage time. Secondly, there is evidence in this case showing that the competition among platforms is not the future development trend, but the current status of competition among Internet companies. For instance, the competition between global search engine service provider Google and global social networking site Facebook in the online advertising market in the United States proves that different service platforms compete directly with one another. The plaintiff also claims in its Prospectus that its biggest competitor is Tencent and that these two companies take advantage of their respective platforms to compete in value-added services and online advertising. Zhou Hongyi, the CEO of the Plaintiff thinks that an "Internet platform can take the form of instant messaging, search engine, or security (software)." Therefore, the Internet industry is currently at the stage that different varieties of free products or services offered by platforms are merely different approaches to attract users and build up the platform. The competition among Internet companies is essentially the competition of valued-added services and advertising businesses offered on their platforms. This is also the reason why the "3Q war" happened between the plaintiff and the defendant, although they provide different products, i.e. security and anti-virus products and instant messaging, respectively. In this case, although we still cannot determine whether there is close substitution between the security-software platform and

the instant-messaging platform, status of products competition and market structure of the Internet industry should be taken into account in defining the relevant product market. Thirdly, the Internet industry is a dynamic market and it is very easy for other companies to imitate those products, services and business models which have been successful in this industry. The market entry barriers are very low. Thus, in addition to using demand substitution in the definition of the relevant market, the factor of supply substitution should also be considered and we should include the potential capacity of other companies in the relevant market.

Based on the analysis of the claims both parties have made, the Court finds that the plaintiff's claim that integrated instant messaging products and services constitute a separate relevant product market is unfounded and the Court does not support it.

B. *The Definition of the Relevant Geographic Market*

The plaintiff claims that the relevant geographic market in this case is the instant messaging software and services market in mainland China. The defendant claims that the relevant geographic market in this case should be the global market. The Court finds that, firstly, the operators and users of instant messaging services are not limited to those based in mainland China. Due to the openness and interoperability of the Internet, operators and users are not confined by national borders. There is evidence in this case showing that operators overseas can provide instant messaging services to users in mainland China. The defendant also provides services to users around the world. There are a certain amount of Chinese-language users in Hong Kong, Macao, Taiwan, and other regions of the world that make use of the instant messaging products provided by the defendant; there are also foreign-language users around the world making use of the foreign-language version instant messaging services provided by the defendant. Secondly, the user's language preferences and product usage habits cannot be used as the sole basis in the definition of geographic market. As mentioned earlier, operators usually provide multiple language versions of instant messaging software to meet the needs of users who speak different languages. Users in mainland China often choose instant messaging services provided by operators overseas (such as MSN, ICQ, Yahoo Messenger, Skype, etc.), illustrating that the user's language preference does not lead to the situation that instant messaging services operators abroad cannot compete with operators in mainland China. As for product usage habits, an iResearch report mentions that TOM-Skype offers a global search directory through which users can search for known or unknown friends with different search options and they can immediately engage in unimpeded voice chat. In the Microsoft/Skype case, the European Commission believes that due to the fact that worldwide users share the same habit in their acceptance of instant messaging services, there is no geographical limitation of the products and services of the operators resulting from differences in the usage habits. Thirdly, in terms of providing and accessing

instant messaging services on a global scale, there are no additional transportation costs, price costs, or other costs for market participants of instant messaging products and services. At present, there are no legal or technical standards that limit the provision and use of these services worldwide. In summary, the Court finds that the relevant geographic market in this case is the global market.

II. ON THE ISSUE OF WHETHER THE DEFENDANT HAS A DOMINANT POSITION IN THE RELEVANT MARKET

The second paragraph of Article 17 of the Anti-monopoly Law states that a dominant market position refers to the business operator(s)'s ability to control a product's price, quantity or other trading conditions in the relevant market, or to hinder or affect other business operators' entry into the relevant market. Article 18 provides that the following factors should be taken into consideration when determining whether a business operator has a dominant market position: the business operator's market share in the relevant market and the competition situation of the relevant market; the business operator's ability to control the sales markets or the raw material procurement markets; the financial and technical conditions of the business operator; the degree to which other business operators rely on the business operator in their transaction; the degree of difficulty for other business operators to enter the relevant market; and other factors relevant to the determination of the dominant market position of the said business operator. That's to say, in the determination of the business operator's dominant position, various factors, including market share, the competition situation of the market, and the degree of difficulty of market entry. Article 19 makes the rules of presumption of a dominant market position, i.e. if the market share of one operator in the relevant market accounts for 50 percent or more, such an operator can be presumed to have a dominant market position, but the rules allow operators to provide evidence to overturn the presumption.

As mentioned earlier, the plaintiff's definition of the relevant product market and the relevant geographic market in this case is too narrow. Thus, the market share of the defendant calculated by the plaintiff based on the plaintiff's definition of the relevant product market and geographic market is not objective, and cannot truly reflect the defendant's market share and position in the relevant markets. In particular, the product scope defined by the iResearch report, the most important evidence submitted by the plaintiff, is different from that defined by the Court in the following aspects: (1) iResearch's monitoring of instant messaging software only targets the PC end products and does not include instant messaging software on mobile phones and tablet PCs; (2) microblogging and SNS social networking sites with instant messaging products as part of their core products are not included in the product group of the relevant market; web-based instant messaging products provided by microblogging and SNS social networking sites, which the plaintiff itself claims belong to the instant messaging relevant market scope, are not included either; (3) the scope of the iResearch and

CNNIC studies is limited to mainland China and does not include Hong Kong, Macao and Taiwan regions and other parts of the world that use QQ products, and so on. Therefore, the iResearch's finding that Tencent's market share of the overall instant messaging market in China in 2010 accounted for 76.2% is not a true reflection of Tencent QQ's market share in the relevant market in this case. In summary, the Court does not recognize the claim by the plaintiff that the defendant has a monopoly position in the relevant market, which is presumed upon market share calculated on an untrue basis.

To say the least, even in the narrowest relevant market proposed by the plaintiff, i.e., integrated instant messaging products and services in mainland China, it is not sufficient to presume that the defendant has a dominant market position just on the basis that the defendant's market share is more than 50% of the relevant market. The reasons are as follows:

A. *The Defendant Does Not Have the Ability to Control the Price, Quantity of Goods or Other Trading Conditions*

Firstly, the defendant does not have the ability to control the prices of goods. As mentioned earlier, almost all instant messaging software and services are offered to users for free and users are not willing to pay any fees for the basic services of instant messaging software. So the defendant cannot take advantage of its leading market position and get pricing rights over other competitors. As for the plaintiffs' expert's claim that the hypothetical monopolist of free instant messaging products might generate profits by lowering the quality of products or non- temporarily raising the hidden price of the products on a small scale, the Court will address the issue in the part below about the state of market competition. Secondly, the defendant does not have the ability to control the quantity of goods or other trading conditions. There are various types of instant messaging software on the Internet and users have many choices. According to a CNNIC survey, the ratio of users who use more than two kinds of instant messaging software within six months is as high as 63.4%; another 8.7% of users of instant messaging services have changed their tools for chat within six months and many users who have changed their tools turn to emerging instant messaging software. There is a high degree of substitutability among instant messaging products. Once one instant messaging software malfunctions, users can immediately replace it with instant messaging software. There is no evidence showing that the defendant dares to easily refuse to provide products and services to users or to change the terms of trade. Thirdly, regarding the degree to which other business operators rely on the defendant, the counterparty can easily choose to deal with other corporations and is thus less dependent on the defendant. The plaintiff's proof concerning commercial disputes between the defendant and LineKong and UCWeb Inc. is the unilateral declaration of LineKong and UCWeb Inc. The available evidence is insufficient to prove that the defendant has strong control over the counterparty in the transactions.

B. *The Defendant Does Not Have the Ability to Impede or Affect Other Operators' Entry Into the Relevant Market*

1. This market's entry barrier is low and the hindrance to expansion is small

Firstly, the barrier for operators to enter the instant messaging market is low. Instant messaging services do not need heavy investment or complex technology. Internet service providers, terminal manufacturers, software companies and the three major operators are generally optimistic about the market and there are large numbers of operators entering this market every year. For instance, in mainland China in 2011, many instant messaging products, such as Shanda Youni, Apple iMessage, China Unicom "Wo You", "Kouxin" launched by the plaintiff, China Mobile "Feiliao", China Telecom, Corpease IMO, Tudu Talk2.0Beta and "NetEase Messenger" entered the market. Secondly, the means of entry into the market are diversified. For instance, NetEase and Kaixin Network entered the market through the integration of instant messaging services in mailbox services and social networking sites services; meanwhile, Renren.com and Sina microblog have quickly developed their own client software products for instant messaging. A CNNIC survey shows that with the number of users of other internet services growing, some emerging instant messaging tools relying on other Internet services have developed rapidly. Thirdly, newcomers to the market have a strong ability to expand and a lot of success stories prove that the resistance to market expansion is weak. For instance, various kinds of instant messaging software such as Fetion launched by China Mobile in 2006, Aliwangwang launched by Alibaba in 2007, Baidu Hi launched by Baidu Inc in 2008, YY Voice launched by Duowan.com in 2008, have quickly obtained a certain share of the market by segmenting their respective users not long after their respective entries into the market.

2. Regarding "customer stickiness", i.e. network effect

The plaintiff has repeatedly emphasized that there is an obvious network effect in the instant messaging industry, i.e., for one user, the value of an instant messaging product depends on the number of other users of such products. In other words, the more users who use a certain instant communication product, the more attractive it is to other users. Meanwhile, in the instant messaging industry, there is a user lock-in effect. That is, during the long-term use of QQ, users have formed a chain of friends on QQ and established their social circles on QQ. If they switch to other instant messaging products, the cost of rebuilding a social circle will be high. Meanwhile, switching to other instant messaging products also requires the user to get familiar with features and characteristics of the new product and to change usage habits. Due to the existence of network effect and user lock-in effect, it is generally difficult for other operators to enter this market, and difficult to survive after entry. The Court finds that, firstly, because most users connect with friends and family, i.e. the "core circle," through instant messaging services,

the role of the network effect is greatly reduced. According to data from Facebook, users usually maintain two-way interactions only with four to six people. So these users can easily change among instant messaging services. Secondly, in the Microsoft/Skype case, the European Commission found that a lot of users freely switch their access among a number of consumer communications service providers. The circumstances of the QQ software in this case are similar. The CNNIC report points out that "around the year of 2007, along with the development of a number of the emerging instant messaging tools, the ratio of users who use two to three different instant messaging software simultaneously increased gradually, already more than 50%"; The report also predicts that "in the future, users who use a variety of instant messaging tools simultaneously will increase further." The QQ software is not a "must have" product to users since there are a variety of alternatives to meet users' needs for instant messaging. The defendant is unable to control the user's choice of instant messaging software. Meanwhile, users can build social networks with a high degree of overlapping with several kinds of instant messaging software at the same time, so they can minimize the impact of the user lock-in effect, i.e. "customer stickiness," when switching between different instant messaging software. Thirdly, when the defendant started the development and operation of the QQ products, MSN was the leading instant messaging service provider with the largest share of the Chinese market. However, thanks to its unique products and quality service, the defendant has quickly expanded the scale of operation to attract more users and has ultimately achieved a larger market share than that of MSN in a relatively short period of time. Therefore, the network effect and the user lock-in effect are not insurmountable barriers for instant messaging products and services.

3. Sufficient competition in the relevant market

Instant messaging market is in a highly competitive and highly unstable state, with new technologies, new business models emerging continuously. There is no evidence suggesting that one enterprise may control the market for a long period of time. Even in the absence of external forces, this market can also easily achieve full competition and self-renewal. Firstly, the evidence of this case shows that there is fierce competition among traditional instant messaging software products. In recent years, the number of users of such products as Fetion, Aliwangwang, and YY Voice has increased sharply, each with more than 100 million users. Secondly, with integration of instant messaging services in emerging SNS, microblogging, e-mail, and other products, competition in the relevant market is further intensified. Emerging instant messaging products have brought tremendous competition pressure and market impact on traditional instant messaging products. Survey results of iResearch show that in recent years emerging microblogging and social services have been trying to replace instant messaging. With the rapid development of microblogging and social networking sites, users' dependence on instant messaging has started to decrease. The survey results of CNNIC show that

many potential alternatives pose a threat to instant messaging: with the rapid development of the e-mail market, many service providers have integrated instant messaging features into the mailbox, driving the development of market consolidation. In addition, with the development of SNS sites such as kaixin001.com and renren.com, as well as the increase of user stickiness, users make more frequent use of information transfer functions of the social networking sites, which also have a certain impact on the use of instant messaging tools. Therefore, the instant messaging services market claimed by the plaintiff is a highly innovative, competitive, and dynamic market. Operators have the ability to engage in continuous innovation in order to maintain a competitive edge in this market. At the same time, in such a state of competition, the operators do not dare to lower product quality, or make a lot of advertising which will affect the level of user experience, regardless of the feelings of consumers. Therefore, the Court finds that there does not exist many persistent instances to make profits by lowering product quality or non-temporarily raising the hidden price of products as alleged by the plaintiff's expert.

4. The financial status and technical conditions of the defendant do not enable it to substantially exclude new competitors from entering the market or expanding capacity

Firstly, the evidence in this case suggests that China Mobile, China Unicom, China Telecom, Alibaba, Baidu and other competitors entering the field of instant messaging in the wake of Tencent all have very strong financial and technical capabilities. All these large enterprises have enough strength to exert a tremendous impact on the leading position of the defendant in this field. Secondly, in the Internet field, there are a lot of venture capital funds. As long as companies have good products and users, venture capital institutions will actively enter the market and provide strong financial support to business operators. Most Internet companies rely on venture capital funds to rapidly expand their scale of operation.

In summary, due to the special market conditions of the Internet industry, market share in particular cannot be deemed as a decisive factor in the determination of a dominant market position. Even in the narrowest relevant market claimed by the plaintiff, as is mentioned in the CNNIC report, Tencent's dominant market position does not suppress or limit the scope of market development of other instant messaging products and does not constitute obstacles to the development of the market as a whole. Tencent does not have a dominant position in this market.

III. REGARDING WHETHER THE DEFENDANT ENGAGES IN CONDUCT OFABUSING A DOMINANT POSITION TO EXCLUDE OR RESTRICT COMP ETITION

A party's dominant market position is the basis upon which the conduct of restricting transactions without legitimate reasons is prohibited by Article 17 of the

Anti-monopoly Law. Through the above analysis of the definition of the relevant market, standards for the calculation of market share, as well as the fact that market share is not the decisive factor of a dominant position, the Court finds that the plaintiff cannot prove that the defendant has a dominant position in the relevant market in this case. Therefore, regardless of whether the relevant conduct of the defendant is consistent with the requirements of the conduct of illegally restricting transactions, such conduct cannot be identified as conduct of restricting transactions without legitimate reasons or as a tying arrangement. However, in order to correctly define what kind of market conduct of Internet companies is indicative of abuse of dominance, to maintain market order of the Internet industry, and to fully protect the market competition mechanism, the Court will analyze the essence of "forcing users to choose one of the two" in the 2010 "3Q war", as well as whether the defendant-made tying arrangements.

(A) On the Essence of the Defendant's Conduct of "Incompatible Products" (Users' Choice of One from the Two)

Article 17 of the Anti-monopoly Law provides that a business operator with market dominant position restricting trade counterparties to dealing exclusively with itself or with its designated business entities, without legitimate reason(s), is conduct of abuse of dominant position. In this case, the defendant forced users to "choose one from the two," ostensibly giving users the option, but if the defendant is an operator with a dominant market position, the users are very likely to give up 360 and choose QQ. The defendant's purpose of adopting the measure of "choice of one from the two" is not to refuse to deal with the users, but rather to force the users to only deal with QQ and stop dealing with 360. The act of the defendant essentially still belongs to conduct of restricting transactions.

The defendant counterclaims that making the QQ software incompatible with the 360 security guards is attributable to the tort by the plaintiff. The plaintiff took advantage of 360 Privacy Protector, Koukou bodyguards and the pop-up page function of the 360 security guards to destruct and tamper with features of the QQ software and slander QQ. At the same time, the plaintiff integrated 360 Privacy Protector and 360 Koukou bodyguards into the 360 Security Guards, making use of the large number of users of 360 Security Guards to implement further infringement. In order to ensure the proper functioning of QQ, the defendant had to take technical measures of incompatibility to prevent and exclude the destruction from the plaintiff's software to defendant's own products. Thus, it is a legitimate act of self-remedy. The Court finds that, according to Articles 128 and 129 of China's General Principles of the Civil Law and Articles 30 and 31 of "Tort Liability Act," there are two types of self-remedies in the civil law: justifiable defense and the emergency actions. Justifiable defense is an act of defense employed to stop an unlawful infringement for the purpose of avoiding the said infringement in the public interest, or for defender's own or another person's right of the person, property right, thus causing harm to the unlawful infringer. Anyone who causes harm to another for

exercising justifiable defense shall not be subject to tort liability. Emergency actions refer to an act that a person is compelled to commit in an emergency to avert an immediate danger to the public interest or to his own or another person's lawful rights, and that causes harm to another smaller interest. If harm occurs through emergency actions taken to avoid danger, the person who gives rise to the danger shall be subject to the liability. Justifiable defense and emergency actions shall not exceed the limits of necessity. In view of the fact identified by Beijing No.2 Intermediate People's Court [2011] No. 12237 Final Civil Judgment, the plaintiff had engaged in unfair competition against Tencent Technology (Shenzhen) Inc. & Shenzhen Tencent Computer System Inc. through 360 Privacy Protector and remarks on the Internet. Due to the unique nature of the Internet industry, violations implemented through the Internet spread broadly and quickly, and the losses are difficult to recover. So the legitimate rights and interests of the defendant were indeed at risk at that time. But even if the legitimate rights and interests of the defendant are subject to unlawful infringement and justifiable defense was needed, the direct object of self-remedy counterattack shall be the unlawful infringer, i.e. the plaintiff in this case, but not Internet users. Meanwhile, the preliminary injunction system in the intellectual property infringement litigation conferred intellectual property rights holders the right to apply to the People's Court for interim measures to timely, efficiently, and effectively stop the occurrence or continuance of unlawful infringement when its legitimate rights and interests might suffer an emergency or irreversible infringement. Given the circumstances expressly provided for by law, the defendant did not lawfully exercise its litigation rights to seek ways to stop the unlawful infringement in favor of unilaterally taking the measure of "choice of one from the two," resulting in the expansion of the "3Q war" and affecting users. Thus their conduct is not justifiable. In addition, the defendant's act of forcing users to make the "choice of one from the two" is beyond the limits of necessity. In this case, regardless of whether the plaintiff has engaged in acts of coercing users to use Koukou Bodyguards, or whether the plaintiff has hijacked the QQ security module which led to the malfunction of QQ, the defendant has no right to force users to take actions for the security of QQ accounts. The scope of rights of the defendant is limited to making appropriate risk warnings for this matter. It is the users' own inherent right to decide whether to remove the 360 software or not and the defendant shall not make a choice for the users. Forcing users to make the "choice of one from the two" is beyond the limits of necessity.

(B) On the Issue of Whether the Defendant has Engaged in Conduct of Selling Goods Through a Tying Arrangement Without Legitimate Reasons as is Prohibited by Item (E) of Paragraph One of Article 17 of the Anti-Monopoly Law

According to the provisions of the Anti-Monopoly laws, a tying arrangement is the act taken by a firm in a dominant market position to force the counterparty to

buy products or services unrelated to the contract from nature or trading habits. The purpose of a tying arrangement is to extend the dominant market position to the market of the tied products or to prevent potential competitors from entering the market. A tying arrangement is identified by the following criteria: the tying product and the tied product are separate products; the company making tying arrangements has a dominant market position; the company making the tying arrangement gives consumers no choice but to purchase the tied product; tying arrangement is an unreasonable arrangement, i.e. the tying arrangement is not out of the trading habits of such goods; selling the tied goods separately will not be detrimental to the performance or the value of the goods; the tying arrangement has an anti-competitive effect. In this case, the main function of the defendant's QQ software is instant messaging, which is indeed a separate software product vis-a-vis other software products, such as the QQ Doctor, the QQ PC Manager, the Security Manager, and Safety Management; but firstly, the defendant does not have a dominant position in the instant messaging market. Secondly, the defendant does not limit users' options. The defendant provides users with the option to uninstall the QQ software management and the defendant's provision of QQ software services is not preconditioned by the user having to use the QQ software management, which is not a mandatory act; in addition, when the defendant upgraded the QQ software management and QQ Doctor to QQ PC Manager, an upgrade notice was issued to the users before the upgrade. The upgrade would proceed only after the users had made such a choice. So the defendant has fulfilled the obligation of informing users and giving users the option to make a decision. Thirdly, the defendant's acts are of economic rationality. The package installation of QQ software management and the QQ software is the functional integration of products, which is conducive to better management of the QQ software by users through the use of auxiliary tools software, protecting the security of the users' QQ accounts; to the contrary, if the defendant does not offer security products together with QQ instant messaging software, such an act may be detrimental to the performance or value of the QQ software products. Fourthly, the relevant acts of the defendant do not produce the effect of eliminating or restricting competition. The plaintiff has no evidence proving that the defendant's packaged installation behavior has led to a significant drop in market share of the plaintiff's similar products; and no evidence proving that such behavior has resulted in the elimination or restriction of competition among other competitors in the same market. Fifthly, the plaintiff does not provide evidence proving that the defendant's behavior of packaged installation of QQ software management and the upgrade of QQ software management and QQ Doctors to QQ PC Manager has caused or will cause damage to consumers. Therefore, the plaintiff's claim that the defendant has engaged in acts of tying arrangement and abuse of dominance is unfounded.

In summary, because the plaintiff's definition of the relevant product market in

this case is wrong and the evidence provided by the plaintiff is insufficient to prove that the defendant has a monopoly position in the relevant product market, the plaintiff's request that the Court order the defendant to immediately stop the monopoly tort of abuse of dominance, jointly and severally compensate for the plaintiff's economic loss as well as a reasonable cost of protecting its rights, and make an apology is lacking of factual and legal basis, and therefore cannot be established, and should be dismissed. In accordance with the provisions of the first paragraph of Article 64 of the Civil Procedure Law of the People's Republic of China, it is ruled as follows:

Dismissed all the claims of the plaintiff Beijing Qihoo Technology Co., Ltd.

In this case, the acceptance fee of the court of first instance is 796,800 yuan, which shall be borne by the plaintiff Qihoo Technology Co., Ltd.

If a party refuses to accept this judgment, it can file an appeal petition with this Court within 15 days after the date on which the written judgment is served and copies of the appeal petition shall be provided according to the number of persons in the other party and appeal at the Supreme People's Court.

The Presiding Judge: Zhang Xuejun

Judge: Deng

Yanhui Acting Judge:

Yue Lihao

March 20, 2013